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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1214

IN RE: BEEF INDUSTRY ANTITRUST LITIGATION (PACKER CASES)

Iowa Beef Processors, Inc., et al.,

Petitioners,

vs.

Meat Price Investigators Ass'n, Darrell Cameron, and Don Ludvigson, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	3
Statement of the Case	3
The Beef Industry Antitrust Litigation	3
The Spencer Settlement	4
The Flavorland Settlement	5
IBP's Contribution Claim	6
The Fifth Circuit's Decision	6
Reasons for Granting the Writ	8
I. The Settlement Class Device Subverts Rule 23's Safeguards	8
II. This Court Must Resolve Conflicts on the Availability of Antitrust Contribution and Choice of Law	16
Conclusion	19

APPENDICES

A. Record Appendix

1. Hearing on Spencer Settlement (5/25/78) A-1
2. Order Conditionally Determining a Temporary Settlement Class and Tentatively Approving Proposed Settlement (5/25/78) A-5
3. Notice to the Spencer Settlement Class A-10
4. Final Order (8/21/78) A-17
5. Order Denying IBP Motion to Amend Answer to Assert Counterclaim (9/1/78) A-22
6. Order Conditionally Determining a Second Temporary Settlement Class and Tentatively Approving Proposed Flavorland Settlement (12/21/78) A-23
7. Notice to the Flavorland Settlement Class A-28
8. Fifth Circuit Opinion (11/26/79) A-37

B. Statutes and Rules Appendix

1. Sherman Act, Sections 1 and 2 ..... B-1
2. Clayton Act, Section 4 ..... B-1
3. Federal Rule of Civil Procedure 23: Class Actions B-2

LIST OF AUTHORITIES CITED

Cases

Abraham Construction Co. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir.), rehearing denied, 608 F.2d 524 (5th Cir. 1979), cert. petn. pending, No. 79-1144 17
Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978) 16
Ampicillin Antitrust Litigation, In Re, 82 F.R.D. 652 (D.D.C. 1979) 13
Beef Industry Antitrust Litigation, In re, 600 F.2d 1148 (5th Cir. 1979) 7
Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975) 17
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) .. 1, 2, 14
Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 7
Impervious Paint Industries, Inc. v. Ashland Oil, Inc., Nos. C78-0068L(A) and C78-0069L(A) (W.D. Ky., 8/2/78 unreported) 13
Little Rock School District v. Borden, Inc., 1980-1 Tr. Cas. ¶63,059 (E.D. Ark. 1979) 18
Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Tr. Cas. ¶62,995 (10th Cir. 1979), rehearing en banc granted (12/27/79) 17
Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967) 13
Plumbing Fixtures Litigation, In Re, 342 F.Supp. 757 (J.P.M.L. 1972) 18
Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), rehearing en banc denied (4/17/79) 16
Reiter v. Sonotone Corp., 99 S.Ct. 2326 (1979) 19
Stirling v. Chemical Bank, 382 F.Supp. 1146 (S.D.N.Y. 1974), aff'd on basis of district court opinion, 516 F.2d 1396 (2nd Cir. 1975) 17
United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 15
Westvaco Corp. v. Adams Extract Co., 10/30/79 (5th Cir. unreported), cert. petn. pending No. 79-972 17
Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978) 16

Statutes and Rules

15 U.S.C. §1 3
15 U.S.C. §2 3
15 U.S.C. §15 3
28 U.S.C. §1254(1) 2
28 U.S.C. §2101(c) 2

Federal Rules of Civil Procedure:

Rule 23 ..... *passim*
Rule 54(b) 15

Miscellaneous

Comment, Developments—Class Actions, 89 Harv.L. Rev. 1318 (1976) 12
Manual for Complex Litigation §1.46 8
Miller, An Overview of Federal Class Actions: Past, Present and Future (Fed.Jud.Center, Dec. 1977) .. 8, 9-10
3 Newberg, Class Actions 13

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IN RE: BEEF INDUSTRY ANTITRUST LITIGATION (PACKER CASES)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Iowa Beef Processors, Inc. ("IBP"), MBPXL Corporation ("MBPXL"), and Farr Farms Company and Farr Feeders, Inc. ("Farr") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the most important class action decision since *Eisen*, the Fifth Circuit allowed representative plaintiffs to finance antitrust treble damage class litigation through pre-Rule 23 certification settlement of class claims with selected defendants, while at the same time denying a non-settling defendant the right to seek contribution which it would have had in the multidistrict transferor circuit.

OPINIONS BELOW

The pertinent orders of the United States District Court for the Northern District of Texas, Dallas Division, are unreported and are appended at A-5 through A-36. The opinion of the Court of Appeals is reported at 607 F.2d 167 (5th Cir. 1979) and is appended at A-37.

JURISDICTION

The Fifth Circuit's judgment was entered on November 26, 1979; rehearing was denied on December 21, 1979; and the mandate was stayed on January 7, 1980 pending disposition of this petition. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether the "settlement class" device contravenes Federal Rule of Civil Procedure 23 and this Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), by allowing representative plaintiffs to use the mere threat of class certification to coerce a partial settlement with some defendants to finance litigation costs and prejudice the non-settling defendants' opposition to class certification.

2. Whether defendants in federal antitrust cases have rights of contribution as a matter of law.

3. Whether the substantive law of the multidistrict transferor forum must be applied by the transferee forum in case of a conflict.

STATUTES AND RULES INVOLVED

The pertinent provisions of the federal antitrust laws, 15 U.S.C. §§ 1, 2, and 15, and the text of Rule 23, F.R.Civ.P., are appended at B-1 *et seq.*

STATEMENT OF THE CASE

The Beef Industry Antitrust Litigation

These three antitrust treble damage suits were filed in the Southern District of Iowa at Des Moines by several groups of cattle feeders with common counsel against four beef packers, but were transferred by the Judicial Panel on Multidistrict Litigation to Judge William M. Taylor, Jr. in the Northern District of Texas at Dallas for consolidated and coordinated pretrial proceedings with parallel suits previously filed by the same cattle feeders and others against all of the major retail supermarket chains. In conflicting allegations, the supermarkets were accused of conspiring to depress wholesale beef prices which in turn forced packers to pay less for live cattle; while the packers were accused of conspiring to depress their own wholesale beef prices so they could justify paying less for cattle.

The last-filed packer case, *Ludvigson*, was brought in the name of four individual cattle feeders as proposed representatives of a nationwide class consisting of all persons in the business of raising "fat cattle" who in any year since 1968 had sold more than 100 head. Damages from the alleged conspiracies to depress cattle prices are claimed to be at least $1 billion per year.

The Spencer Settlement

Instead of pursuing their class certification motion in *Ludvigson*, plaintiffs' counsel proceeded to negotiate a lump sum settlement of both class and non-class claims for their clients in all three packer cases with one defendant, Spencer Foods, for $425,000. Judge Taylor was kept informed of the reasons for and status of the negotiations, but this was done *ex parte* and without any record of what was said concerning the merits of the claims or the propriety of class action treatment.

On May 25, 1978, at a five-minute ceremonial *ex parte* hearing, and without receiving any evidence, Judge Taylor entered an order prepared by the settling parties "conditionally determining a temporary settlement class," "tentatively approving" the proposed Spencer settlement, directing notice to be mailed to the class, and setting a hearing on the settlement for August 11, 1978. (A-1, 5.) The notice, mailed to a selected portion of a beef industry trade magazine's computerized mailing list and Spencer's cattle suppliers, warned that the court would probably award the entire $425,000 fund to plaintiffs as reimbursement of unspecified past and future costs and expenses and the settlement class members would receive nothing. (A-14.)

Judge Taylor summarily denied non-settling defendants' motions to reconsider the propriety of the *ex parte*

procedures used to obtain preliminary approval of class status and Spencer's settlement with the class.

At the August 11, 1978 hearing no evidence was introduced to support the adequacy of the settlement except Spencer's self-serving testimony that $425,000 was all it could afford to pay; and plaintiffs' counsel made no effort to show that a class action was maintainable under Rule 23 except to ask that the court take blanket judicial notice of the discovery record developed by the supermarket defendants to oppose certification of a similar class (which was in fact never certified) and suggest that the May 25, 1978 *ex parte* order had already decided the class issues. Judge Taylor rejected, for lack of standing, non-settling defendants' objections to the pre-certification class settlement procedure. He also overruled objections by class member Farr to the lack of evidence supporting the adequacy of the settlement and the conflict of interest inherent in proposed class counsel negotiating, prior to certification, a settlement of class claims designed to reimburse unspecified expenses of their non-class clients and finance future litigation expenses by their proposed class representative clients. Judge Taylor announced that he would approve the class settlement simply because "the parties want to settle" and entered the formal order on August 21, 1978. (A-17.)

The Flavorland Settlement

Only after approving the Spencer settlement did the District Court finally turn to the plaintiffs' class certification motion. Judge Taylor allowed seven weeks for discovery and, at defendants' request, held an evidentiary hearing from December 12 to 15, 1978.[1]

[1] The class certification issue has been briefed, but not yet decided by the district court.

On the eve of the evidentiary hearing, Flavorland Industries, which had objected to the Spencer settlement procedures, reached a $750,000 settlement with plaintiffs. The Flavorland settlement was not mentioned during the evidentiary hearing and was to be processed in the same *ex parte* manner as the Spencer settlement (see A-23), but the Fifth Circuit stayed the mailing of the notice to the class pending appeals by IBP and MBPXL.

IBP's Contribution Claim

Because it appeared that the District Court was determined to approve a settlement by Spencer which was *de minimus* compared to plaintiffs' massive damage claims, IBP moved, prior to the August 11, 1978 hearing, for leave to amend its answers to assert a contribution cross-claim against Spencer to insure that it would not have to bear the risk of the entire amount of any damages awarded. But the District Court denied leave to amend on the ground that contribution was not available to treble damage defendants under the federal antitrust laws. (A-22.)

The Fifth Circuit's Decision

On November 26, 1979, the Fifth Circuit condoned the District Court's handling of the Spencer and Flavorland settlements and upheld its use of the settlement class device. The Court of Appeals, however, appears to have largely based this decision on its erroneous beliefs that District Judge Taylor had previously certified a litigation class in the supermarket cases (see A-40, 41) and

that class member Farr did not object to the merits of the settlement (see A-56, 58).[2]

The Fifth Circuit also affirmed the District Court's denial of IBP's right to seek contribution from Spencer, even though IBP would now have that right if these cases had not been transferred by the Judicial Panel from the Eighth Circuit, which allows antitrust contribution.

Finally, the Fifth Circuit held that IBP and MBPXL had no standing to challenge either the Spencer or Flavorland settlements or to take appeals, even though they claimed prejudice to their continuing opposition to class certification and the District Court had authorized immediate appeal of the Spencer settlement under Rule 54(b), F.R.Civ.P. (The Fifth Circuit conceded standing and appealability with respect to IBP's appeal of contribution and Farr's appeal of the Spencer settlement.)

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[2] Judge Taylor had never reached the class certification issue because of his summary judgment dismissal of all of the supermarket cases for lack of purchasing privity with the cattle feeders under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Fifth Circuit reversed, holding that the cattle feeders were entitled to try to prove that conspiratorily depressed wholesale beef prices were passively passed on by packers under the cost-plus exception to *Illinois Brick*, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), but the supermarket defendants' petition for rehearing *en banc* is still pending.

Farr strenuously objected to the merits of the settlement for lack of evidentiary support, proposed use of the fund for purposes which did not benefit the class, and the conflict of interest inherent in the same counsel negotiating a lump-sum settlement of class and non-class claims for the benefit of non-class clients.

REASONS FOR GRANTING THE WRIT

I.

THE SETTLEMENT CLASS DEVICE SUBVERTS RULE 23's SAFEGUARDS.

Whether Rule 23 permits the formation of a class solely for the purposes of settlement "presents one of the sharpest controversies that has arisen among judges since the promulgation of amended Rule 23." Miller, An Overview of Federal Class Actions: Past, Present and Future 59 (Fed.Jud.Center, Dec. 1977).

The Manual for Complex Litigation has long emphatically rejected the use of a temporary settlement class:

> There is, to say the least, serious doubt that this practice is authorized by Rule 23 as amended, even if it is conceded that the courts are expected to develop new methods of employing the amended Rule 23.
>
> Consideration of this practice in view of the provisions of Rule 23 and experience to date leads to the conclusion that *tentative classes for the purposes of settlement * * * should not be formed.* [Manual for Complex Litigation, § 1.46, 1 Pt. 2 Moore's Federal Practice (2nd Ed. 1978), at 71; emphasis added.]

The Manual lists a number of reasons supporting this conclusion (see A-64-66)—some reflecting a concern for the interests of the absent class members whose claims are being used as bargaining chips, others reflecting a concern for defendants who may be coerced into settling "under threat of a class action which may not really exist." The underlying theme of the Manual's objections to the temporary settlement class device is that neither

the language of Rule 23 nor the general policy favoring settlements justifies ignoring the procedural safeguards devised to govern the "most sensitive area" of class action settlements.

Professor Arthur R. Miller, perhaps the leading expert on complex class action litigation, has concisely summarized the continuing dispute over the formation of settlement classes and his own conclusion that the device should not be used:

> One school of thought, which has been forcefully articulated in the *Manual for Complex Litigation*, by a Board of Editors composed of experienced class action judges, argues that a true settlement never should be allowed prior to certification because the risk of abuse is too high if the inquiries required by the seven class action prerequisites are not made. * * * Stated somewhat differently, the Board of Editors, and a number of other judges, believe that in the process of going through the certification inquiry the district judge will learn a great deal to help him in determining the bona fides of any settlement that subsequently is proposed and this gives greater assurance that the objectives of Rule 23(e) will be satisfied. Finally, there is the textual argument that Rule 23(c)(1) requires the certification issue to be determined "as soon as practicable" and the formation of tentative classes is inconsistent with this objective.
>
> The other school of thought is that the system should encourage settlement whenever it is possible to do so. Since the certification question is an extremely difficult one and often takes two or more years to resolve, the litigants should not be inhibited from settling by artificially declaring that the certification process must be completed first.
>
> Personally, I have always found this to be a close debate. So close as a matter of fact that in Volume 7A of the Wright & Miller treatise there are

> passages intimating the authors' belief that the tentative formation of a class is a proper practice, but in the pocket part of that Volume there is some backtracking from that view. I have become convinced in recent years that there really is a serious problem of the judge not having enough information prior to certification to do a completely effective job under Rule 23(e). What is clear, is that if the court is going to consider a proposed settlement prior to formal certification, he is advised to demand a full presentation on all of those aspects of certification bearing on an adequacy of representation and class homogeny. Ironically, if he does, he might as well complete the Rule 23(c)(1) process. [Miller, *supra*, at 59-60; footnotes omitted.]

Professor Miller's prophetic concerns have been fulfilled in this case, where there was neither a full presentation on the class issues at the settlement hearing nor a deferral of settlement until the certification process could be completed. Moreover, the irony of permitting pre-certification partial settlements is perfectly illustrated: the negotiating and processing of the Spencer settlement, which was allowed to preempt and postpone the class certification process for almost a year, took longer than the seven months required to process the class certification motion from the inception of discovery through evidentiary hearing and the filing of 400 pages of briefs.

Perhaps the Manual's concerns about collusion and extortion could be alleviated if a district court exercises its Rule 23(e) power to condition its approval upon a searching inquiry into the fairness of the settlement to both absent class members and the settling defendant. Indeed, the Fifth Circuit's opinion repeatedly tries to create the illusion that this is what happened here; but the record is otherwise. The District Court's hearings

were purely perfunctory, designed only to rubber-stamp the stipulations of the settling parties because of an overriding interest in promoting settlement.

In fact, what happened here perfectly illustrates the folly of relying solely on district court discretion to avoid the abuse of pre-certification settlements. While we do not question the Fifth Circuit's assumption (A-39) that the bargaining between plaintiffs' attorneys and Spencer was adversary, the fact is that plaintiffs' counsel were using the claims of a class they had not yet been authorized to represent to offer Spencer a chance to settle complex and costly litigation, with billions claimed to be at stake, and to get rid of an obstacle to a favorable stock tender offer—all for an amount which turned out to be only $425,000. On the other hand, Spencer was offering the plaintiffs in the non-class actions a chance to recoup costs which they had incurred prior to the filing of the class action and the named class representatives the chance to avoid advancing expenses necessary to finance future litigation. Under these circumstances, there is an obvious danger that Spencer paid either too much or too little—but no one knows for sure because the settlement was never subjected to careful judicial scrutiny based on probative evidence.

Similarly, the Fifth Circuit's naive belief that there would be close supervision over the disbursement of the funds is belied by the stipulated procedure approved by the District Court: the class notice contained no information to justify the expressed virtual certainty that the entire settlement fund would be paid to non-class plaintiffs; no showing was required at the settlement hearing where possible objectors could be heard; and consideration was indefinitely postponed with no provision for notice to possible objectors.

But even if it could be said that careful supervision by the District Court could—and did—avoid the collusion and extortion problems latent in permitting pre-certification settlements, this case illustrates still another problem which has been virtually ignored by the commentators and authorities because they have focused only on complete settlements. Here, settlements with only some defendants are involved, leaving open difficult and contested class certification issues and not relieving the burden of the litigation on the court. Thus, to the already troublesome issue of whether it is possible to achieve fairness to the absent class members and the settling defendants in a pre-certification settlement, there is added a third dimension: prejudice to non-settling defendants.

Again, the Fifth Circuit gave only superficial consideration to the issue, simply stating that since the class was approved for settlement purposes only, the non-settling defendants would not be prejudiced in their opposition to the litigation class. Even if this were theoretically true, practically it is plainly false, for a judge who has already approved a settlement which has a constitutional *res judicata* effect on absent class members only if Rule 23's prerequisites are met would be under inordinate pressure to certify the class for litigation purposes and preserve the integrity of the settlement.

The Fifth Circuit's confusing attempt to find a theoretical basis for using the settlement class device in a partial settlement context only serves to illustrate the dilemma facing the District Judge. First, the Fifth Circuit quotes approvingly a Harvard Law Review Comment that a tentative settlement class is a "form of conditional certification, sanctioned by Rule 23(c)(1)." (A-

52.) If so, a subsequent finding that the requirements of Rule 23 had not been met would require decertification and, logically, nullification of the settlement. Next, the Fifth Circuit quotes approvingly from Professor Newberg who apparently appreciates this problem and instead perceives "the temporary settlement class as nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class ruling under Rule 23 criterion." (A-52-53.) Newberg is obviously addressing himself only to a global settlement, where the fiction of the tentative assumption can never be challenged, and completely fails to consider the problems raised by a partial settlement followed by a finding that there really is no Rule 23 class.[3]

The non-settling defendants are entitled to have their opposition to class certification considered by an unvarnished judicial mind and should not have to bear the burden of persuading the judge that he erred in determining that the settlement class met Rule 23's requirements. In a very real sense, plaintiffs who, *ex parte*, are able to get a judge to approve a partial pre-certification class settlement have shifted to the non-

[3] Similarly, there are very few known decisions which involve *partial* pre-certification class settlements and they are divided on the issue: the earliest decision, *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 328 (E.D. Pa. 1967), followed the Manual approach and declined to approve a class settlement prior to certification. Two recent district court decisions conflict; *Impervious Paint Industries, Inc. v. Ashland Oil, Inc.*, Nos. C78-0068L(A) and C78-0069L(A), (W.D. Ky., August 2, 1978; unreported), followed the earlier precedent and deferred settlement consideration until certification; *In re Ampicillin Antitrust Litigation*, 82 F.R.D. 652, 654-655 (D.D.C. 1979), adopted the pre-certification settlement class procedure, but the non-settling defendant apparently did not raise the issue of prejudice to the class determination.

settling defendants what should have been their burden to prove, by competent evidence, each of the often-difficult elements of Rule 23. This is not idle speculation, for at the outset of the December 12, 1978 evidentiary hearing on the class certification issue, plaintiffs' counsel took the position that Judge Taylor's approval of the Spencer settlement had "largely determined" most of the class issues in their favor.

The use of the settlement class device for partial settlements raises concerns very similar to those in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), over the "mini-hearing on the merits" procedure for determining whether the cost of notice to the class should be shifted to the defendants. This Court stated in *Eisen* that:

> Such a procedure contravenes the Rule [23] by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ." *** Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant. [*Id.*, at 177-178.]

The settlement class device also allowed the plaintiffs here to obtain the benefits of a class action without first demonstrating compliance with Rule 23's criteria and also resulted in *ex parte* judicial approval of the plaintiff's class proposals which will certainly color, if not fully control, subsequent class decisions to the prejudice of the non-settling defendants. The warnings of the Manual for Complex Litigation about prejudice to both class members and defendants through use of the settlement class device prior to Rule 23 certification have been unwisely ignored to facilitate what are only partial settlements. Expediency as a reaction to the enormous pressure placed on court resources by massive class action claims was also the genesis of the "mini-hearing on the merits" device in *Eisen*, but this Court refused to permit it there and has also recently emphasized that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975).

The question of whether—and under what circumstances—settlement of class claims prior to Rule 23 class certification should be permitted is a vital current issue in class action management that is ripe for decision now.[4] Like the mini-trial device in *Eisen*, it is far too important to be left to *ad hoc* determination by lower

[4] If IBP and MBPXL are correct that their opposition to class certification has been prejudiced through *ex parte* procedures, they necessarily have standing to appeal and the "collateral order" criteria would be satisfied because review cannot be effectively deferred until final judgment. In any event, the District Court specifically certified the Spencer settlement order as final for appeal under Rule 54(b), F.R.Civ.P. (A-21) and even the Fifth Circuit had to agree that class objector Farr does have standing to challenge and appeal the use of the settlement class device and the approval of the Spencer settlement.

courts burdened with class litigation and anxious to promote settlements. If the Fifth Circuit's imprimatur goes uncensured, representative plaintiffs will enjoy unprecedented leverage without establishing class status, early-settling defendants will be able to settle their liability for enough to finance the litigation, and the plaintiffs will have a new tactic for avoiding the exacting requirements of Rule 23 concerning adequacy of representation and notice, predominance of common issues, and manageability, which are exceedingly difficult to meet in an industry as complex as the beef industry. Compare *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

II.

THIS COURT MUST RESOLVE CONFLICTS ON THE AVAILABILITY OF ANTITRUST CONTRIBUTION AND CHOICE OF LAW.

Not only was IBP denied standing to contest the use of the settlement class device for the purposes of the Spencer settlement, but in addition IBP must now face the risk of bearing what might have been Spencer's fair share of damages, since Spencer's settlement was very small compared to the plaintiffs' massive damage claims.

The contribution question is a vital current issue of federal antitrust law and has generated a square conflict among the Circuits. The Eighth Circuit held that contribution is available to antitrust treble damage defendants in *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), *rehearing en banc denied* (April 17, 1979). The

Fifth Circuit subsequently refused to allow antitrust contribution in two cases in which petitions for certiorari are already pending: *Wilson P. Abraham Construction Co. v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir.), *rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *cert. petn. pending*, No. 79-1144 and *Westvaco Corp. v. Adams Extract Co.*, Oct. 30, 1979 (5th Cir. unreported), *cert. petn. pending*, No. 79-972. The Fifth Circuit's refusal to allow contribution has been followed by a divided Tenth Circuit in *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Tr.Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted* (Dec. 27, 1979).

The Eighth Circuit held that contribution must be available if the deterrence goal of the Sherman Act is to be maximized and also to achieve "fairness between the parties." *Professional Beauty Supply, supra*, 594 F.2d at 1185. However, both the Fifth Circuit and the divided Tenth Circuit panel in *Olson Farms, supra*, disputed the deterrence effect of contribution and the idea that denying contribution was inequitable. Thus, the conflict among the Circuits arises not only over the applicability to federal antitrust law of the obsolete common law rule of no-contribution-among-joint-tortfeasors, but also from a clear disagreement on issues of policy and equity which reach the core of the federal antitrust laws.

The serious consequences of this intercircuit conflict are graphically illustrated in this case. The three suits involved were originally filed in Iowa (the Eighth Circuit) and were transferred to Dallas (the Fifth Circuit) by the Judicial Panel on Multidistrict Litigation. The Second Circuit and the Judicial Panel itself have ruled that the law of the transferor district stays with cases transferred to another circuit for convenience by the Judicial Panel. See *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408 n.7 (2nd Cir. 1975); *Stirling v.*

Chemical Bank, 382 F.Supp. 1146, 1150 n.5 (S.D.N.Y. 1974), *aff'd on basis of district court opinion*, 516 F.2d 1396 (2nd Cir. 1975); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (JPML 1972). But the Fifth Circuit, without discussion, refused to follow these cases and held instead that its own conflicting contribution law controlled.

Thus, the Fifth Circuit's opinion not only reaffirms the conflict on the substantive contribution issue, but creates another conflict on which circuit's law is to be applied in multidistrict litigation when there is a conflict.

The petition for certiorari in *Westvaco* fully develops the reasons for resolving the antitrust contribution conflict and they will not be repeated here. It should be emphasized, however, that allowing contribution will not necessarily result in either precluding individual defendants from settling or complicating already complex litigation. Contribution can be applied so as to allow a settling defendant to terminate its involvement in litigation, but without prejudice to non-settling defendants, by simply reducing the plaintiffs' claims in proportion to the settling defendants' share of liability. This approach—advocated by IBP from the outset—has recently been adopted by a district court in the Eighth Circuit, whose law should be controlling here. See *Little Rock School District v. Borden, Inc.*, 1980-1 Tr.Cas. ¶63,059 (E.D. Ark. 1979).

CONCLUSION

This Court recently cautioned that "[d]istrict courts must be especially alert to identify frivolous claims brought to extort nuisance settlements" and should exercise their Rule 23 powers accordingly. *Reiter v. Sonotone Corp.*, 99 S.Ct. 2326, 2334 (1979). But the approval by the Fifth Circuit of the settlement class device for partial pre-certification settlements, coupled with its denial of any contribution remedy to non-settling defendants, confers unprecedented leverage on plaintiffs who have filed purported class actions seeking immense amounts of damages but who have not yet been tested either on the propriety of their class status or on the merits of their antitrust accusations.

Petitioners ask this Court to grant a writ of certiorari and set this case for full briefing and argument.

Respectfully submitted,

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APPENDICES

A. Record Appendix

1. Hearing on Spencer Settlement (5/25/78) A-1
2. Order Conditionally Determining a Temporary Settlement Class and Tentatively Approving Proposed Settlement (5/25/78) A-5
3. Notice to the Spencer Settlement Class A-10
4. Final Order (8/21/78) A-17
5. Order Denying IBP Motion to Amend Answer to Assert Counterclaim (9/1/78) A-22
6. Order Conditionally Determining a Second Temporary Settlement Class and Tentatively Approving Proposed Flavorland Settlement (12/21/78) A-23
7. Notice to the Flavorland Settlement Class A-28
8. Fifth Circuit Opinion (11/26/79) A-37

B. Statutes and Rules Appendix

1. Sherman Act, Sections 1 and 2 ..... B-1
2. Clayton Act, Section 4 ..... B-1
3. Federal Rule of Civil Procedure 23: Class Actions B-2

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: BEEF INDUSTRY ANTITRUST LITIGATION	))	MDL NO. 248

HEARING ON SPENCER SETTLEMENT

Be It Remembered That on the 25th day of May, A.D., 1978, before the Honorable W. M. Taylor Jr., United States District Judge, at Dallas, Texas, the following proceedings were had in the above styled and numbered cause:

PROCEEDINGS

The Court: Where do we go?

Mr. Hawkins: Well, Judge, I am going to defer to the class action experts, so whoever wants to take over.

Mr. Cochrane: Well, Your Honor, we were advised by Mr. Purdy of some of the Court's concerns and we were constrained to meet with Mr. Stringer representing Spencer Foods. We went through in great detail the Court's concerns and we modified the language hopefully in those areas that the Court had concerns in that we would meet the criteria that the Court has set out for us.

We are mindful at all times that the Court, not us, represents the absent class members, we are merely the agents of the Court and are here to do what the Court wants us to do.

And also in that regard we are prepared to tell the Court we have made a time line which starts today but that is not of any great consequence because our prior time has been set off by seven days but all other systems are go.

We have our mechanical jobs done vis-a-vis all of the lists, all of the computer tapes, all the mailing, the printing, proofreading will be done and we will have it down to the Court whenever he wants it.

The Court has been furnished with our amendments. I don't know whether or not it got here. Did you get a paste-up, Mr. Purdy? Your Honor, we sent you our corrections, did we not?

The Court: Yes, I got your letter or the letter with reference to the responses to the questions that the Court had raised and I have reviewed them and they are satisfactory.

Mr. Cochrane: Well, Your Honor, we are prepared then to file today, we have delivered to Mr. Stringer's satisfaction today signed copies of the Settlement Agreement and all documents that he has required and he is prepared to file with the clerk today the Settlement Agreement that starts this machinery in motion. We would then ask the Court—what we're here for is the dates to be approved in the time line.

The Court: I have been looking at this while I have been listening to you. I have been listening to you more than looking at it but it appears to be entirely satisfactory. Of course, today is May 25th. Notices to the class are to be mailed by June 9th, 1978; file an affidavit as to the mailing seven days after that; last day for filing and so forth, July 14th, that's fine; file report August 4th, hear the settlement August 11th. That's fine.

Mr. Cochrane: Fine, Your Honor.

If the Court would sign the Order as of today we will obtain the necessary two post office boxes this afternoon that must go into the notice and we will then proceed with the settlement, Your Honor.

The Court: All right. The Order—is this it?

Mr. Cochrane: That's it, Your Honor.

Mr. Hawkins: Ed, have you got a copy?

Mr. Stringer: Do we want to make that one the Court file, Your Honor?

The Court: No, this is the final, I mean it has all of the addenda.

Mr. Stringer: That's right, Your Honor. The only changes are in the notice and those would be in accordance with the changes that we submitted and the Court has now approved.

Mr. Cochrane: May we then for the record conform all our copies that the Orders are signed today?

The Court: Yes.

Mr. Cochrane: Thank you, Your Honor.

Mr. Hawkins: He needs a copy of the Order.

Mr. Stringer: What Order are we talking about now?

Mr. Cochrane: We are talking about the Order conditionally determining the settlement class, tentatively class settlement signed by Judge Taylor, that's the first Order.

Mr. Hawkins: The first Order.

Mr. Purdy: With the corrections listed.

Mr. Cochrane: I think we might as well use the documents which were submitted in the packet form. I think we should have the Court's signature on the Order for deposit. That was the next item of business.

If I may, Your Honor, here's an Order, Your Honor, conditionally determining. Would you come up here, Ed, to make sure we have the correct one?

Mr. Stringer: Sure.

Mr. Cochrane: I think we should date it today. Would you write that?

Mr. Stringer: Yes. We will insert, Your Honor, the appropriate dates. If you will sign it we will insert the appropriate dates, Your Honor, with Mr. Purdy.

The Court: Okay.

Mr. Cochrane: Then if the Court would sign the deposit Order for the deposit of funds which is back a little further then we will make this the official copy.

Mr. Stringer: Okay.

The Court: You will fill in the appropriate blanks.

Mr. Cochrane: Yes, we will fill in the appropriate blanks, Your Honor, and conform the other copies.

Mr. Stringer: John, if that's going to be the official Court record we should sign the joint motions.

Mr. Cochrane: We will sign the joint motions.

Mr. Hawkins: We will do that right now.

Mr. Cochrane: We will do that right now.

Mr. Stringer: Right.

Mr. Cochrane: And fill in the appropriate blanks. Then we will sit down and conform one for you and Mr. Purdy and one for the Court.

Mr. Stringer: I guess he can probably go back and fill in all of the dates.

Mr. Cochrane: We will conform it for the Court, all of the dates and we won't take the Court's time doing that now.

The Court: Do you need this?

Mr. Cochrane: No, if the Court wants that time line. This is the original copy now. Any other signature that is needed on the escrow agreement will be executed. Your Honor, we have talked to the escrow agents and they are receptive and they will be executed in due time and duly filed as all other documents will be.

The Court: All right.

Mr. Cochrane: And we will this afternoon obtain from the Post Office Department the necessary two post office boxes with the numbers before we leave Dallas to insert in the documents here for the notice of mailing.

The Court: All right.

Mr. Cochrane: Judge, we need your signature on this Order. This is the Order conditionally determining.

The Court: All right.

(Hearing concluded.)

ORDER CONDITIONALLY DETERMINING A TEMPORARY SETTLEMENT CLASS AND TENTATIVELY APPROVING PROPOSED SETTLEMENT

[Filed May 25, 1978]

The above matter came on for hearing before the Court on the 25th day of May, 1978, on the Joint Motion and Stipulation of Plaintiffs and defendant Spencer Foods, Inc. (herein "Spencer"), by and through their respective counsel. Counsel for all parties to this litigation with standing being given an opportunity to be heard on the Motions, Stipulations of Counsel, arguments and the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. These actions were commenced in the United States District Court for the Southern District of Iowa on the following dates:

	Date
Meat Price Investigators Association, et al. v. Iowa Beef Processors, Inc., et al.	August 10, 1976
Don Ludvigson, et al. v. Iowa Beef Processors, Inc., et al.	July 12, 1977
Darrell Cameron, et al. v. Iowa Beef Processors, Inc., et al.	June 23, 1977

The above proceeding entitled *Don Ludvigson, et al.* v. *Iowa Beef Processors, Inc., et al.* alleges claims on behalf of a class described in the complaint consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the complaints sold more than 100 head of fat cattle

per annum in any year during the relevant period, including all persons who have sold fat cattle to the defendants and their suppliers. *Ludvigson* plaintiffs have filed a Motion for Class Determination together with Affidavits in support thereof.

2. Pursuant to Order of the Judicial Panel on Multidistrict Litigation, these actions have been transferred to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings pursuant to 28 U.S.C. §1497.

3. The principal allegation in these complaints as to defendant Spencer is that it combined and conspired with other defendants to restrain trade in the fat cattle industry in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §1 and §2.

4. Spencer and non-settling defendants deny that this action may properly proceed as a class action and deny all remaining allegations of the complaints. Defendant Spencer further represents to the Court that if these actions continue against Spencer, it will continue the defense of this litigation.

5. On the 25 day of May, 1978, Plaintiffs and defendant Spencer entered into an agreement which provides, *inter alia,* that plaintiffs' claims against defendant Spencer be dismissed with prejudice in exchange for certain consideration as provided in the Covenant Not to Sue and Settlement Agreement (herein "Settlement Agreement"), a copy of which has been filed with the Court. The Settlement Agreement represents the proposed compromise of disputed claims and in no way constitutes an admission of liability by defendant Spencer with respect to any of the material allegations in the complaint. Counsel for Plaintiffs and counsel for defendant Spencer believe the proposed settlement to be fair, reasonable and adequate, giving due consideration to the tangible benefits which will accrue to the parties thereto.

6. Counsel for Plaintiffs and defendant Spencer agree to the formation of a Temporary Settlement

Class solely for purposes of this proposed settlement. The Temporary Settlement Class consists of all persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers (hereinafter referred to as the "Temporary Settlement Class"). The Temporary Settlement Class so defined sufficiently appear to meet the requisite of Rule 23, Federal Rules of Civil Procedure to warrant the conclusion that there is a Temporary Settlement Class.

7. On the basis of the files, records and proceedings herein and the submission of counsel, the Court finds that there has been sufficient showing that the proposed settlement is fair, reasonable and adequate to warrant submitting it to the members of the Temporary Settlement Class, taking into consideration the benefits to be derived by Plaintiffs and members of the Temporary Settlement Class as a result of the settlement, the expense and uncertainties of litigating the claims herein and the continued presence of the non-settling defendants.

CONCLUSIONS OF LAW

1. There exists, for purposes of this settlement, a Temporary Settlement Class consisting of all persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers.

2. The members of the Temporary Settlement Class are sufficiently identified to permit adequate notice of these proceedings by United States mail.

3. The Covenant Not to Sue and Settlement Agreement is *prima facie* fair, reasonable and adequate on all matters relating hereto. A hearing on all matters relating hereto shall be held on the 11 day of August, 1978, at which each member of the Temporary Settlement Class who has filed a written appearance shall be heard as to the fairness, reasonableness and adequacy of the settlement. Appearances shall be filed in accordance with the Notice not later than the 14 day of July, 1978.

4. Members of the Temporary Settlement Class are afforded an opportunity to be excluded from the Class, or to appear by counsel of their own choosing and/or to appear and object, and to submit argument or evidence on the approval of the proposed settlement herein.

5. The Notice attached to this Order as Exhibit A fairly and reasonably informs members of the Temporary Settlement Class of their rights.

6. Mailing the Notice by first class mail to members of the Temporary Settlement Class is the best notice practicable under the circumstances and is in compliance with Rule 23(c)(2), Federal Rules of Civil Procedure.

On the foregoing Findings of Fact and Conclusions of Law, the Court makes the following

ORDER

1. Notice in the form of Exhibit A attached shall be sent by first class mail to all members of the Temporary Settlement Class. Affidavits of Mailing certifying to compliance with this Order shall be filed on or before 30 days prior to the hearing.

2. On the 11 day of August, 1978, a hearing shall be held in Room 15B16, United States Courthouse, Dallas, Texas, on the Joint Motion of Plaintiffs and defendant Spencer for final approval of the Covenant

Not to Sue and Settlement Agreement and determination of a Permanent Settlement Class.

Dated this 25th day of May, 1978.

/s/ William M. Taylor, Jr.
Judge of the United States
District Court

NOTICE TO PERSONS WHO ARE ENGAGED IN THE BUSINESS OF RAISING AND SELLING FAT CATTLE OF FORMATION OF TEMPORARY SETTLEMENT CLASS AND PROPOSED SETTLEMENT

[Filed May 25, 1978]

Pursuant to Rules 23(c)(2), 23(d) and 23(e) of the Federal Rules of Civil Procedure, You Are Hereby Notified:

There are now pending in this Court civil actions for treble damages for alleged violations of the antitrust laws with respect to the purchase of fat cattle by the above named defendants. The *Ludvigson* action above named has been brought as a class action on behalf of a class described in the complaint consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the complaint sold more than 100 head of fat cattle per annum in any year during the relevant period, including all persons who have sold fat cattle to the defendants and their suppliers.

Defendant Spencer Foods, Inc., while denying the alleged violations and liability on account thereof, has agreed to settle the claims of Plaintiffs in these three actions and the claims of the members of the Class. For this purpose only, defendant Spencer Foods, Inc. has agreed to, and the Court has designated, a Temporary Settlement Class consisting of those persons and parties, excluding the defendants, alleged to be members of the class in the *Ludvigson* action, but limited to those members who sold 100 head of fat cattle per annum in any year since January 1, 1968.

This notice is being sent to you in the belief that you are or may be a member of this Temporary Settlement Class whose rights may be affected by this litigation. This notice is not to be misunderstood as an expression of any opinion by this Court as to the

merits of any of the claims or defenses asserted by either side in this litigation, or as to any amount that any claimant would receive, but is sent for the sole purpose of informing you of the pendency of this litigation and the settlement so that you may make decisions as to what steps you may wish to take in relation to these lawsuits.

The complaint filed in the Ludvigson class action seeks recovery of treble damages together with reimbursement of costs and an award of attorneys' fees, on behalf of the named Plaintiffs and the members of the class whom they represent, for alleged overcharges resulting from an alleged antitrust conspiracy and monopolization among defendants with respect to the purchase of fat cattle by the defendants.

The parties against whom claims for relief are asserted in all actions are:

A. Non-settling defendants: Iowa Beef Processors, Inc., a Delaware corporation; Lucille S. Holman, Marcella R. Scott and Marvin S. Bernstein, Co-Executors of the Estate of Currier J. Holman, deceased; MBPXL Corporation, a Delaware corporation; Flavorland Industries, Inc., a Delaware corporation; and National Provisioner, Incorporated.

B. Settling defendant: Spencer Foods, Inc., a Delaware corporation.

The Plaintiffs allege that the defendants combined and conspired, commencing at least as early as 1968, and have engaged in unlawful combination and conspiracy to monopolize, and have monopolized and attempted to monopolize and have fixed, lowered, and maintained the prices and terms and conditions of the purchase of live fat cattle, divided territories for the purpose of restricting the market and have otherwise combined and conspired to violate the antitrust laws of the United States. The plaintiffs further allege that Plaintiffs and members of the alleged Class received lower prices for cattle than would otherwise have been received and seek recovery of treble dam-

ages, together with reimbursement of costs and an award of attorneys' fees.

Defendants deny all of these allegations and deny that they have violated the antitrust laws and that there is any basis for the claims asserted against them.

The Court has not passed on any contentions of the parties and all of the claims are subject to continuing litigation. This notice does not express the opinion of the Court as to the merits of the claims or the defenses asserted by any party to this litigation.

During the past several months, the Plaintiffs and defendant Spencer Foods, Inc., while denying all liability, have negotiated and entered into a Covenant Not to Sue and Settlement Agreement ("Settlement Agreement"), which Settlement Agreement has been submitted to the Court and is on file with the Clerk of the United States District Court for the Northern District of Texas, Dallas Division.

Notice Is Hereby Given, that a hearing will be held before the Court beginning on the 11 day of August, 1978, at 9:30 o'clock A.M. in the courtroom of The Honorable William M. Taylor, Jr., on the 15th floor of the Federal Office Building, 1100 Commerce, Dallas, Texas. The hearing may be adjourned from time to time by the Court. The purpose of the hearing is to determine whether the Temporary Settlement Class will be designated a Permanent Settlement Class and whether the Settlement Agreement offered by defendant Spencer Foods, Inc. should be approved by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. If so approved, defendant Spencer Foods, Inc. will be dismissed from these actions by judgments of dismissal with prejudice.

A very general description of the settlement plan follows, but the only complete and accurate statement of the terms of the settlement is contained in the Settlement Agreement on file with the Clerk of the United States District Court for the Northern District of Texas, Dallas Division, in M.D.L. Docket No. 248, Unit-

ed States District Court, Federal Office Building, 1100 Commerce, Dallas, Texas.

The Settlement Agreement provides for the following:

1. Payment of the sum of Four Hundred Twenty-Five Thousand Dollars ($425,000.00) by defendant Spencer Foods, Inc. into a Settlement Fund, and disbursement of sums from said fund on behalf of Plaintiffs and members of the Class only in accordance with the Settlement Agreement and as directed by the Court; use of the funds for mailing, printing and administrative expenses not to exceed $30,000 incurred in connection with notifying the Temporary Settlement Class of this Settlement Agreement and for purposes of Plaintiffs' motion for Class certification.

2. Defendant Spencer Foods, Inc. has the right to withdraw from this settlement in the event:

(a) the Court, or appellate Court, determines that these actions may not be settled on behalf of the Class described above; or

(b) the Court directs notice to the Settlement Class that fails to meet the standards set forth in the Settlement Agreement; or

(c) that these actions are not dismissed with prejudice as to defendant, Spencer Foods, Inc.; or

(d) defendant Spencer Foods, Inc., determines that the number of Settlement Class members electing to be excluded from the Permanent Settlement Class is significant.

3. In the event defendant Spencer Foods, Inc. does not exercise its right to withdraw from the settlement, it will permit counsel for Plaintiffs to interview or depose or examine employees of defendant Spencer Foods, Inc. and to inspect and copy its documents regarding matters not privileged which are relevant to the subject matter of this litigation.

4. Plaintiffs, for themselves and on behalf of members of the Settlement Class, covenant to refrain from

instituting, prosecuting, maintaining, or engaging in any proceeding against defendant Spencer Foods, Inc., its subsidiaries or affiliates, past or present directors, officers, employees, or agents upon claims or causes of action asserted in this litigation or which could have been asserted herein.

5. All claims against defendant Spencer Foods, Inc. will be dismissed with prejudice and on the merits, and a final judgment of dismissal will be entered as to it.

Counsel for Plaintiffs have advised the Court as follows concerning the Settlement Fund:

1. Counsel for Plaintiffs will not request attorneys' fees from the Settlement Fund.

2. Counsel for Plaintiffs will request the Court to approve disbursement of amounts for past and future out-of-pocket costs and expenses incurred and to be incurred in this litigation.

3. No requests for reimbursement of out-of-pocket costs and expenses from the Settlement Fund account have been heard or granted by the Court as of the date hereof. However, Plaintiffs have incurred substantial costs and expenses to date and it is anticipated that they will continue to incur substantial costs and expenses during the course of this litigation. It is likely, therefore, that if good cause is shown to the Court, Plaintiffs may be granted amounts from the Settlement Fund for reimbursement of prior costs and expenses and future costs and expenses in sums which will exhaust the entire Settlement Fund. In that event, no member of the proposed Class will receive any amounts from the Settlement Fund.

4. In the event that there are funds remaining in the Settlement Fund upon termination of this litigation, such funds will be added to whatever funds, if any, are available for distribution to Plaintiffs as a result of a settlement of these actions or an award of damages, less any amounts allowed by the Court after proper petition for fees and unreimbursed costs and expenses. In the event there are no additional funds

available for final distribution, the Court will distribute the balance of the Settlement Fund, upon such terms and conditions as the Court deems just and proper.

You Are Further Notified:

1. If you are a person within the definition of the Temporary Settlement Class and if you have in any year since January 1, 1968, sold 100 head of fat cattle per year:

(a) You will be included in, bound by, and subject to the settlement herein, if approved by the Court, and the Judgments in these actions and any determination affecting the Permanent Settlement Class whether favorable or not, unless on or before July 14, 1978, you mail to the Clerk of the Court at the address hereafter set forth a written request to be excluded from the Permanent Settlement Class. If you elect to be excluded from the Permanent Settlement Class, you will be free to pursue on your own behalf whatever legal rights you may have.

(b) If you do not request to be excluded from the Permanent Settlement Class by July 14, 1978, you may, but need not, enter an appearance through counsel of your own choosing. If you do not enter an appearance and do not request exclusion from the Permanent Settlement Class, counsel for the named Plaintiffs will represent you for purposes of this settlement and you will be bound by the terms of the Settlement Agreement if approved by the Court.

2. At the hearing on August 11, 1978, any member of the Temporary Settlement Class in this action who has not elected to be excluded from the Permanent Settlement Class may appear and present any proper argument and evidence on the issues to be heard provided, however, that no member of the Temporary Settlement Class shall be heard and no evidence, papers or briefs shall be received by this Court unless the

written objection of the Temporary Settlement Class member, the notice of intention to appear and oppose the Settlement Agreement, and all other related papers and briefs are filed on or before July 14, 1978, with the Clerk of Court at the address hereinafter set forth.

3. If you should elect to be excluded from the Permanent Settlement Class, or if you should desire to be represented by counsel of your own choosing or if you should desire to appear and present argument or evidence on the settlement, your notice should be to:

Joseph McElroy, Jr.
Clerk of the United States District Court
for the Northern District of Texas
Dallas Division
Post Office Box 50844
Dallas, Texas 75202

4. The Court will make a determination as to the existence of a Permanent Settlement Class and approval of the settlement following the hearing on August 11, 1978. Any member of the Temporary Settlement Class who has filed an appearance pursuant to paragraph 1(b) hereof, or any other interested person who makes inquiry in writing of counsel listed below, will be advised of the Court's final action or order concerning this proposed settlement and determination of a Permanent Settlement Class.

Lex Hawkins, Esq.
2800 Fleur Drive
Des Moines, Iowa 60321

John A. Cochrane, Esq.
Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102

Dated this 25th day of May, 1978.

/s/ William M. Taylor, Jr.
Judge of the United States
District Judge

ORDER FINALLY DETERMINING PERMANENT SETTLEMENT CLASS AND FINALLY APPROVING SETTLEMENT OF CLASS ACTION AS TO DEFENDANT SPENCER FOODS, INC.

[Filed August 21, 1978]

This cause came on for hearing on the 11th day of August, 1978, in Dallas, Texas, pursuant to this Court's Order of May 25, 1978, and the Notice (herein "Notice") to persons who are engaged in the business of raising and selling fat cattle of formation of Temporary Settlement Class and proposed Settlement of the same date.

Plaintiffs above named and all members of the Temporary Settlement Class were represented at this hearing by Lex Hawkins of Hawkins & Norris, Des Moines, Iowa; John A. Cochrane of Cochrane & Bresnahan, St. Paul, Minnesota; and Donald L. Davis of Witherspoon, Aikin and Langley, Hereford, Texas. Defendant Spencer Foods, Inc., was represented by Edward C. Stringer and Peter Sipkins of Briggs and Morgan, St. Paul, Minnesota.

Edward W. Rothe of Freeman, Rothe, Freeman & Salzman appeared on behalf of defendant IBP, and also on his own behalf as an objecting member of the class; John C. Dods of Shook, Hardy & Bacon appeared on behalf of defendant MBPXL, Roger E. Podesta of Debevoise, Plimpton, Lyons & Gates appeared on behalf of defendant Flavorland Industries, Inc.; Charles T. Newton Jr. of Vinson & Elkins appeared on behalf of objectors Farr Farms Company and Farr Feeders, Inc.

Having re-examined the proposed Covenant Not to Sue and Settlement Agreement dated May 25, 1978; having reviewed all responses to the Notice received by the Clerk from members of the Temporary Settlement Class; having considered submissions of the parties herein; having heard argument and representations of counsel for the respective parties; and being

otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law and issues the following Order:

FINDINGS OF FACT

The Court finds that:

1. On June 8, 1978, in accordance with the Court's Order of May 25, 1978, Notice in the form attached to the Order was mailed by first class mail to all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the Complaint sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers.

2. Counsel for plaintiffs have filed a Report to the Court on Returns Following Mailing of Notice to Members of Temporary Settlement Class (Report) and Advice to the Court of Receipt of Additional Returns Following Mailing of Notice to Temporary Settlement Class (Advice). Each of those persons listed in Appendix C and H to said Report and as Opt-Outs in the Advice has timely requested exclusion from the Permanent Settlement Class. The Court reserves for future determination the question of the effect of questionable opt-outs listed in Appendix D.

3. Objections to the Settlements were filed by Farr Farms Company and Farr Feeders, Inc.; Edward Rothe on behalf of Barb & Ed partnership; and by Robert Templeton on behalf of McCarty & Cummings. Other appearances are listed in the Report and Advice. Opportunity to be heard was afforded to any person who wished to be heard. Testimony was taken from William D. Farr (objector), William L. Heubaum, Vice President and general counsel of IBP, and William Eastwood, Executive Vice President and general counsel of Spencer Foods, Inc. No other parties sought

to give testimony. After full argument on the record by counsel for plaintiffs, settling defendant Spencer Foods, Inc., and non-settling defendants, the Court makes the following:

CONCLUSIONS OF LAW

The Court concludes that:

1. Based upon the foregoing, and being otherwise fully advised in the matter, reasonable effort has been expended to identify and notify each member of the Temporary Settlement Class. The best Notice practicable under the circumstances was provided to all members of the Temporary Settlement Class as required by Rule 23, Federal Rules of Civil Procedure; the Notice adequately explained the terms of the proposed settlement and the consequences of acceptance or rejection; there was full and ample opportunity for the members of the Temporary Settlement Class to subject the proposed settlement to a searching examination; and there was full and ample opportunity for members of the Temporary Settlement Class to opt out, intervene, object, enter an appearance through counsel of their choice, or otherwise be heard.

2. The proposed settlement by and between Plaintiffs and Settlement Class and defendant Spencer Foods, Inc., so set forth in the Covenant Not to Sue and Settlement Agreement should be approved by the Court because: (a) the outcome at trial is uncertain and difficult to predict; (b) defendant Spencer Foods, Inc., has denied any violation of the antitrust laws and the expectation is that they would litigate all issues fully, including appeals, if necessary; (c) the substantial benefit to Settlement Class members resulting from the settlement; and (d) the damage claims of the Settlement Class are protected in this litigation in that the other defendant's remain; (e) the future of Spencer Foods, Inc., and its ability to respond in damages is uncertain due to its financial condition.

3. Based upon consideration of the benefits to be afforded to members of the Settlement Class as set forth in the Covenant Not to Sue and Settlement Agreement, the settlement is fair, adequate and reasonable, is not collusive, and reflects the bona fide compromise of a genuine dispute bearing all the normal perils of litigation as well as the additional uncertainties inherent in a complex class action.

4. The Plaintiffs on their own behalf and on behalf of the Settlement Class accepting the settlement have covenanted not to sue defendant Spencer Foods, Inc., as to any and all claims in the Complaint as alleged or that could have been alleged, as well as from any and all claims arising under the antitrust laws of the United States up to and including the date of approval of the settlement; and all claims against defendant Spencer Foods, Inc., should be dismissed with prejudice and on the merits.

5. That there is no just reason for delay in the entry of an Order and Final Judgment of Dismissal with Prejudice of all claims of Plaintiffs and the members of the Permanent Settlement Class against defendant Spencer Foods, Inc., and such Order and Final Judgment of Dismissal should be directed to be entered by the Clerk pursuant to Rule 54(b), Federal Rules of Civil Procedure.

It Is Hereby Ordered, that:

1. The Temporary Settlement Class, consisting of all persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the Complaint sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers, is hereby declared to be the Permanent Settlement Class for purposes of the settlement of this class action as to defendant Spencer Foods, Inc., and the entry of the

Final Judgment herein, with the exception of those members of the Temporary Settlement Class listed in the Report and Advice who have timely filed their election to opt out;

2. The Covenant Not to Sue and Settlement Agreement is hereby approved;

3. The Clerk of Court is directed to enter a Final Judgment of Dismissal with Prejudice and on the merits of all claims of Plaintiffs and members of the Permanent Settlement Class against Spencer Foods, Inc., and it is expressly determined by the undersigned that there is no just reason for delay in the entry of Final Judgment on this Order.

Ordered, this 21st day of August, 1978.

/s/ William M. Taylor, Jr.
Judge of the United States
District Court

ORDER DENYING MOTION OF DEFENDANT IOWA BEEF PROCESSORS, INC. TO AMEND ANSWER TO ASSERT CROSSCLAIM

[Filed September 1, 1978]

The above matter came on for consideration before this Court pursuant to the motion of defendant Iowa Beef Processors, Inc. to amend its Answer in order to assert a crossclaim for contribution against defendant Spencer Foods, Inc. The Court has received and duly considered the Memorandum filed in support of said defendant's Motion, the Memorandum of defendant Spencer Foods, Inc., in opposition to the Motion, and the Iowa Beef Processors, Inc., Reply Brief in support of the Motion to Amend.

Upon the memoranda of law, and upon this Court's determination that no right of contribution exists under the Federal antitrust laws, and upon all the files, records and proceedings herein,

It Is Hereby Ordered, that the Motion of defendant Iowa Beef Processors, Inc., to amend its Answer to assert a crossclaim against defendant Spencer Foods, Inc., is hereby denied.

Ordered this 1st day of Sept., 1978.

/s/ William M. Taylor, Jr.
Judge of United States
District Court

ORDER CONDITIONALLY DETERMINING A SECOND TEMPORARY SETTLEMENT CLASS AND TENTATIVELY APPROVING PROPOSED FLAVORLAND SETTLEMENT

[Filed December 21, 1978]

The above matter came on for hearing before the Court on the 21st day of December, 1978 on the Joint Motion and Stipulation of Plaintiffs and defendant Flavorland Industries, Inc. (herein "Flavorland"), by and through their respective counsel. Counsel for all parties to this litigation with standing being given an opportunity to be heard on the Motions, Stipulations of Counsel, arguments and the files, records and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. These actions were commenced in the United States District Court for the Southern District of Iowa on the following dates:

	Date
Meat Price Investigators Association, et al. v. Iowa Beef Processors, Inc., et al.	August 10, 1976
Don Ludvigson, et al. v. Iowa Beef Processors, Inc., et al.	July 12, 1977
Darrell Cameron, et al. v. Iowa Beef Processors, Inc., et al.	June 23, 1977

The above proceeding entitled *Don Ludvigson, et al.* v. *Iowa Beef Processors, Inc., et al.* alleges claims on behalf of a class described in the complaint consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the complaints sold more than 100 head of fat

cattle in any year during the relevant period to any packers in the United States or their suppliers, including without limitation all persons who have sold fat cattle in any quantity during such period to the defendants or their suppliers. *Ludvigson* plaintiffs have filed a Motion for Class Determination which is presently pending before the Court.

2. Pursuant to Order of the Judicial Panel on Multidistrict Litigation, these actions have been transferred to the United States District Court for the Northern District of Texas for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407.

3. The principal allegation in those complaints as to defendant Flavorland is that it combined and conspired with other defendants against those engaged in the business of raising fat cattle to restrain trade in the fat cattle industry, through alleged manipulation of prices reported by defendant National Provisioner, Incorporated, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §1 and §2.

4. Flavorland and non-settling defendants deny that this action may properly proceed as a class action for trial purposes and deny all material allegations of the complaints. Defendant Flavorland further represents to the Court that if these actions continue against Flavorland, it will continue the defense of this litigation.

5. On the 21st day of December, 1978, Plaintiffs and defendant Flavorland entered into an agreement which provides, *inter alia,* that Plaintiffs' claims and the claims of the class alleged in the *Ludvigson* action against defendant Flavorland be dismissed with prejudice in exchange for certain consideration as provided in the Covenant Not to Sue and Settlement Agreement (herein "Settlement Agreement"), a copy of which has been filed with the Court. The Settlement Agreement represents the proposed compromise of disputed claims and in no way constitutes an admission of liability by defendant Flavorland with respect to any of the

material allegations in the complaints. Counsel for Plaintiffs and counsel for defendant Flavorland believe the proposed settlement to be fair, reasonable and adequate, giving due consideration to the tangible benefits which will accrue to the parties thereto.

6. Plaintiffs and defendant Flavorland, and their respective counsel, agree to the formation of a Second Temporary Settlement Class solely for purposes of this proposed settlement. The Second Temporary Settlement Class consists of all persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have sold more than 100 head of fat cattle in any year since January 1, 1968 to any packers in the United States or their suppliers, including without limitation all persons who have sold fat cattle in any quantity during such period to the defendants or their suppliers (hereinafter referred to as the "Second Temporary Settlement Class"). The Second Temporary Settlement Class so defined sufficiently appears to meet the requisite of Rule 23, Federal Rules of Civil Procedure, to warrant the conclusion that there is a Second Temporary Settlement Class.

7. On the basis of the files, records and proceedings herein and the submissions of counsel, the Court finds that there has been sufficient showing that the proposed settlement is fair, reasonable and adequate to warrant submitting it to the members of the Second Temporary Settlement Class, taking into consideration the benefits to be derived by Plaintiffs and members of the Second Temporary Settlement Class as a result of the settlement, the expense and uncertainties of litigating the claims herein and the continued presence of the non-settling defendants.

CONCLUSIONS OF LAW

1. There exists, for purposes of this settlement, a Second Temporary Settlement Class consisting of all persons, except defendants, who are engaged in the

business of raising what is commonly known in the cattle business as fat cattle and who have sold more than 100 head of fat cattle in any year since January 1, 1968 to any packers in the United States or their suppliers, including without limitation all persons who have sold fat cattle in any quantity during such period to the defendants or their suppliers.

2. The members of the Second Temporary Settlement Class are sufficiently identified to permit adequate notice of these proceedings by United States mail.

3. The Covenant Not to Sue and Settlement Agreement is *prima facie* fair, reasonable and adequate on all matters relating hereto. A hearing on all matters relating hereto shall be held on the 15th day of February, 1979, at which time each member of the Second Temporary Settlement Class who has filed a written appearance shall be heard as to the fairness, reasonableness and adequacy of the settlement.

4. Members of the Second Temporary Settlement Class are afforded an opportunity to be excluded from the Class, or to appear by counsel of their own choosing and/or to appear and object, and to submit argument or evidence on the approval of the proposed settlement herein, *provided that* all appearances, papers in support or opposition and requests to be so excluded shall be filed and served upon counsel in accordance with the notice not later than February 5, 1979.

5. The Notice attached to this Order as Exhibit A fairly and reasonably informs members of the Second Temporary Settlement Class of their rights.

6. Mailing the Notice by first class mail to members of the Second Temporary Settlement Class in accordance with the procedures followed in connection with the previous settlement with defendant Spencer Foods, Inc. is the best notice practicable under the circumstances and is in compliance with Rules 23(c)(2) and 23(e), Federal Rules of Civil Procedure.

On the foregoing Fndings of Fact and Conclusions of Law, the Court makes the following

ORDER

1. Notice in the form of Exhibit A attached hereto shall be sent by first class mail to the list of persons who were sent Notice of the settlement with Spencer Foods, Inc., as corrected to reflect the address corrections and the like resulting from the mailing of the Spencer Foods, Inc. Notice and as supplemented by any additional names and addresses of Flavorland customers furnished by Flavorland. Affidavits of Mailing certifying to compliance with this Order shall be filed on or before 30 days prior to the hearing. All persons to whom the Notice is addressed who during the period in question sold fat cattle beneficially owned by others are directed to forward a copy of the Notice to the beneficial owners promptly upon receipt thereof.

2. On the 15th day of February, 1979, a hearing shall be held in Room 15B16, United States Courthouse, Dallas, Texas, on the Joint Motion of Plaintiffs and defendant Flavorland for final approval of the Covenant Not to Sue and Settlement Agreement, determination of a Second Permanent Settlement Class and for the entry of final judgment of dismissal on the merits and with prejudice as to defendant Flavorland.

Dated this 21st day of Dec., 1978.

/s/ William M. Taylor, Jr.
Judge of the United States
District Court

EXHIBIT A

NOTICE TO PERSONS WHO ARE ENGAGED IN THE BUSINESS OF RAISING AND SELLING FAT CATTLE OF FORMATION OF SECOND TEMPORARY SETTLEMENT CLASS AND PROPOSED SETTLEMENT WITH FLAVORLAND INDUSTRIES, INC.

Pursuant to Rules 23(c), 23(d) and 23(e) of the Federal Rules of Civil Procedure, You Are Hereby Notified:

There are now pending in this Court the above three civil actions for treble damages for alleged violations of the antitrust laws with respect to the purchase of fat cattle. The *Ludvigson* action above named has been brought as a class action on behalf of a class described in the complaint consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the complaint sold more than 100 head of fat cattle in any year since January 1, 1968, to any packers in the United States or their suppliers, including without limitation all persons who have sold fat cattle in any quantity during such period to the defendants or their suppliers. A motion by Plaintiffs in the *Ludvigson* action for a determination that it may be maintained as a class action for all purposes is presently before the Court for decision.

A previous settlement between Plaintiffs and members of the Class alleged in the *Ludvigson* action with defendant Spencer Foods, Inc. was approved by the Court on August 25, 1978. Under the terms of the Spencer Foods Settlement, which were generally described in a notice dated May 25, 1978, (a) Spencer Foods, Inc. paid the sum of Four Hundred Twenty-Five Thousand Dollars ($425,000.00) into a settlement fund for the benefit of Plaintiffs and Class members, and (b) the actions were dismissed with prejudice and on the merits as against Spencer Foods, Inc. One member of the Class and one of the non-

settling defendants who objected to the Spencer Foods Settlement have appealed from the Court's order approving the settlement and dismissing Spencer Foods, Inc. from the case. Unless the Court's order is reversed on appeal, the $425,000.00 proceeds of the previous settlement will be available, subject in every case to prior approval of the Court, for reimbursement of prior and future costs and expenses of the litigation and, to the extent there are funds remaining upon termination of the litigation, for distribution to Plaintiffs and Class members upon terms and conditions approved by the Court.

Defendant Flavorland Industries, Inc., while denying the alleged violations and any liability on account thereof, has now also agreed to settle the claims of Plaintiffs in these three actions and the claims of the members of the Class. For this purpose only, defendant Flavorland Industries, Inc. has agreed to, and the Court has designated, a Second Temporary Settlement Class consisting of those persons and parties, excluding the defendants, alleged to be members of the Class described above in the *Ludvigson* action. As more fully described below, Flavorland Industries, Inc., while denying any violation of law, has agreed to pay the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00) in three installments in full settlement of *Ludvigson* and the other two actions in order to avoid the expense and inconvenience of protracted litigation.

This notice is being sent to you in the belief that you are or may be a member of this Second Temporary Settlement Class whose rights may be affected by this litigation. If you had any customers who beneficially owned fat cattle sold by you during the period in question, you should forward a copy of this notice by mail to such customers promptly upon receipt.

This notice is not to be misunderstood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side

in this litigation, or as to any amount that any claimant would receive, but is sent for the sole purpose of informing you of the pendency of this litigation and the proposed settlement so that you may make decisions as to what steps you may wish to take in relation to these lawsuits.

The complaint filed in the *Ludvigson* class action seeks recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees, on behalf of the named Plaintiffs and the members of the Class whom they represent, for losses allegedly resulting from an alleged antitrust conspiracy and monopolization among defendants to reduce the prices paid for the purchase of fat cattle.

Lex Hawkins, Esq. and John A. Cochrane, Esq. are serving as counsel for Plaintiffs and Class members in the *Ludvigson* class action and as counsel for plaintiffs in the other two actions. James Witherspoon, Esq. is also serving as counsel for the Plaintiffs in one of the other two actions.

The parties against whom claims for relief are asserted in all actions are:

A. Non-settling defendants: Iowa Beef Processors, Inc., a Delaware corporation; Lucille S. Holman, Marcella R. Scott and Marvin S. Bernstein, Co-Executors of the Estate of Currier J. Holman, deceased; MBPXL Corporation, a Delaware corporation; and National Provisioner, Incorporated, a New York corporation.

Settling defendant: Flavorland Industries, Inc., a Delaware corporation. (As noted above, defendant Spencer Foods, Inc. has previously settled and been dismissed by the Court from these actions.)

The Plaintiffs allege that the defendants combined and conspired, commencing at least as early as 1968, and have engaged in unlawful combination and conspiracy to monopolize, and have monopolized and attempted to monopolize and have fixed, lowered, and maintained the prices and terms and conditions of the

purchase of live fat cattle, principally through alleged manipulation of prices reported by defendant National Provisioner, Incorporated, divided territories for the purpose of restricting the market and have otherwise combined and conspired to violate the antitrust laws of the United States. The Plaintiffs allege that Plaintiffs and members of the alleged Class received lower prices for cattle than would otherwise have been received and seek recovery of treble damages, together with reimbursement of costs and an award of attorneys' fees.

Defendants deny all of these allegations and deny that they have violated the antitrust laws and that there is any basis for the claims asserted against them.

The Court has not passed on any contentions of the parties and all of the claims are subject to continuing litigation. This notice does not express the opinion of the Court as to the merits of the claims or the defenses asserted by any party to this litigation.

The Plaintiffs and defendant Flavorland Industries, Inc., while denying all liability, have negotiated and entered into a Covenant Not to Sue and Settlement Agreement ("Settlement Agreement"), which Settlement Agreement has been submitted to the Court and is on file with the Clerk of the United States District Court for the Northern District of Texas, Dallas Division.

Notice Is Hereby Given, that a hearing will be held before the Court beginning on the 15th day of February, 1979, at 9:30 o'clock A.M. in the courtroom of The Honorable William M. Taylor, Jr., on the 15th floor of the Federal Office Building, 1100 Commerce, Dallas, Texas. The hearing may be adjourned from time to time by the Court. The purpose of the hearing is to determine whether the Second Temporary Settlement Class will be designated a Second Permanent Settlement Class and whether the Settlement Agreement offered by defendant Flavorland Industries, Inc. should be approved by the Court pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. If so

approved, defendant Flavorland Industries, Inc. will be dismissed from these actions by judgment of dismissal with prejudice.

A very general description of the proposed Flavorland settlement follows, but the only complete and accurate statement of the terms of the proposed settlement is contained in the Settlement Agreement on file with the Clerk of the United States District Court for the Northern District of Texas, Dallas Division, in M.D.L. Docket No. 248, United States District Court, Federal Office Building, 1100 Commerce, Dallas, Texas.

The Settlement Agreement provides for the following:

1. Payment of the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00) by defendant Flavorland Industries, Inc. into a Settlement Fund, and disbursement of sums from said fund on behalf of Plaintiffs and members of the Class only in accordance with the Settlement Agreement and as directed by the Court. A first installment of $250,000.00 will be paid into the Settlement Fund upon execution and delivery of the Settlement Agreement by all Plaintiffs; second and third installments each in the amount of $250,000.00 will be paid, respectively, twelve months and twenty-four months after payment of the first installment. No present affiliate of Flavorland which would otherwise be a member of the Class will participate in any distribution from the Settlement Fund to Class members.

2. Defendant Flavorland Industries, Inc., has the right to withdraw from this settlement in certain events, including:

(a) the Court, or an appellate Court, determines that these actions may not be settled on behalf of the Class described above; or

(b) the Court, or an appellate Court, directs notice to the Settlement Class that fails to meet the standards set forth in the Settlement Agreement; or

(c) these actions are not dismissed with prejudice as to defendant Flavorland Industries, Inc.; or

(d) defendant Flavorland Industries, Inc. determines that the number of Settlement Class members electing to be excluded from the Second Permanent Settlement Class is significant.

3. In the event defendant Flavorland Industries, Inc. does not exercise its right to withdraw from the settlement, it will permit counsel for Plaintiffs to interview or depose or examine employees of defendant Flavorland Industries, Inc. and to inspect and copy its documents regarding matters not privileged which are relevant to the subject matter of these actions.

4. Plaintiffs, for themselves and on behalf of the members of the Settlement Class, covenant to refrain from instituting, prosecuting, maintaining, or engaging in any proceeding against defendant Flavorland Industries, Inc., its subsidiaries or affiliates, past or present owners, directors, officers, employees, or agents upon claims or causes of action asserted in these actions or which could have been asserted herein.

5. All claims against defendant Flavorland Industries, Inc., will be dismissed with prejudice and on the merits, and a final judgment of dismissal will be entered as to it.

Counsel for Plaintiffs have advised the Court as follows concerning the Settlement Fund:

1. In view of the substantial costs and expenses incurred and to be incurred during the course of this litigation, it is quite possible that if good cause is shown to the Court, Plaintiffs may be granted amounts for reimbursement of costs and expenses in sums which will exhaust the entire $425,000.00 provided by the previous settlement with Spencer Foods, Inc.

2. In that event, counsel for Plaintiffs and the Class will request the Court to approve disbursement of amounts from the Settlement Fund being

provided by Flavorland Industries, Inc. for past and future out-of-pocket costs and expenses incurred and to be incurred in this litigation. No such requests have been made or granted by the Court as of the date hereof.

3. To the extent that there are funds remaining in the Spencer Foods, Inc. or Flavorland Industries, Inc. Settlement Funds (aggregating $1,175,000.00) upon termination of this litigation, such funds will be added to whatever funds, if any, are otherwise available for distribution to Plaintiffs and the Class as a result of a settlement of these actions or an award of damages, less any amounts allowed by the court after proper petition for attorneys' fees and unreimbursed costs and expenses. The Court will then distribute these funds, upon such terms and conditions as the Court deems just and proper.

You Are Further Notified:

1. If you are a person within the definition of the Second Temporary Settlement Class:

(a) You will be included in, bound by, and subject to the settlement herein, if approved by the Court, and the Judgments in these actions and any determination affecting the Second Permanent Settlement Class whether favorable or not, unless on or before February 5, 1979, you mail to the Clerk of the Court and to counsel for Plaintiffs and counsel for Flavorland Industries, Inc. at the addresses hereafter set forth a written request to be excluded from the Second Permanent Settlement Class. If you elect to be excluded from the Second Permanent Settlement Class, you will be free to pursue on your own behalf whatever legal rights you may have, but will not be entitled to participate in any distribution from the Settlement Fund.

(b) If you do not request to be excluded from the Second Permanent Settlement Class by February 5, 1979, you may, but need not, enter an

appearance through counsel of your own choosing. If you do not enter an appearance and do not request exclusion from the Second Permanent Settlement Class, counsel for the named Plaintiffs will represent you for purposes of this settlement and you will be bound by the terms of the Settlement Agreement if approved by the Court.

2. At the hearing on February 15, 1979, any member of the Second Temporary Settlement Class in this action who has not elected to be excluded from the Second Permanent Settlement Class may appear and present any proper argument and evidence on the issues to be heard, *provided, however,* that no member of the Second Temporary Settlement Class shall be heard and no evidence, papers or briefs shall be received by this Court unless the written objection of the Second Temporary Settlement Class member, the notice of intention to appear and oppose the Settlement Agreement, and all other related papers and briefs are filed on or before February 5, 1979, with the Clerk of the Court and are served on counsel for Plaintiffs and counsel for Flavorland Industries, Inc. on or before said date at their respective addresses hereinafter set forth.

3. If you should elect to be excluded from the Second Permanent Settlement Class, or if you should desire to be represented by counsel of your own choosing or if you should desire to appear and present argument or evidence on the proposed Flavorland settlement, your notices and related papers should be sent to:

Joseph McElroy, Jr.
Clerk of the United States District Court
for the Northern District of Texas
Dallas Division
Post Office Box 50844
Dallas, Texas 75250

Counsel for Plaintiffs:

Lex Hawkins, Esq.
2801 Fleur Drive
Des Moines, Iowa 50321

John A. Cochrane, Esq.
Cochrane & Bresnahan Building
360 Wabasha Street
St. Paul, Minnesota 55102

Counsel for Flavorland Industries, Inc.:

Robert J. Geniesse
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, N.Y. 10017.

4. The Court will make a determination as to the existence of a Second Permanent Settlement Class and approval of the settlement following the hearing on February 15, 1979. Any member of the Second Temporary Settlement Class who has filed an appearance pursuant to paragraph 1(b) hereof, or any other interested person who makes inquiry in writing of counsel listed above, will be advised of the Court's final action or order concerning this proposed settlement and determination of a Second Permanent Settlement Class.

Dated this 21st day of December, 1978.

/s/ William M. Taylor, Jr.
Judge of the United States
District Court

United States Court of Appeals
Fifth Circuit
November 26, 1979

In re Beef Industry Antitrust Litigation
MDL Docket No. 248

MEAT PRICE INVESTIGATORS ASS'N, *et al.*,
DARRELL CAMERON, *et al.*,
DON LUDVIGSON, *et al.*,

v.

IOWA BEEF PROCESSORS, INC., *et al.*,

CA 3-77-0780-C, CA 3-77-0990-C, CA 3-77-1080-C

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, AINSWORTH and RONEY, Circuit Judges.

WISDOM, Circuit Judge:

These three appeals involve the "packer" side of the Beef Industry Antitrust Litigation; that is, they are appeals in suits by cattlemen against beef processors.[1]

[1] The "retailer" side of the litigation consisted of thirteen actions by the Meat Price Investigation Association, representing about 450 cattlemen, and by cattlemen, ranchers, and cattle feeders against large retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication. The Judicial Panel on Multidistrict Litigation consolidated all these cases for pretrial proceedings before the district judge trying the instant cases. *In re Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (Jud.Pan.Mult.Lit. 1976). The trial court dismissed the complaints in reliance on *Illinois Brick Co. v. Illinois*, 1977, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707. *Becker, et al v. Safeway Stores, Inc.*, No. CA 3-76-1361-C (N.D.Tex.). This Court reversed and remanded. *In re Beef Industry Antitrust Litigation*, 5 Cir. 1979, 600 F.2d 1148.

There was massive discovery in the *Becker* case. In the instant cases, the district court took judicial notice of the transcript and of matters discovered in *Becker*.

The Judicial Panel on Multidistrict Litigation assigned these three cases to the Northern District of Texas for consolidated or coordinated pretrial proceedings with the "retailer" cases. *In re Beef Industry Antitrust Litigation*, 1977, 432 F.Supp. 211. This Court consolidated for argument the appeals in Nos. 78-3345, 78-3346, and 79-1010.

There are three antitrust actions against beef packers: (1) *Price Investigators Association (MPIA) et al v. Iowa Beef Processors, Inc. (IBP)*, filed by the MPIA, an unincorporated association having about 450 cattle raisers as members; (2) *Cameron et al v. IBP*, in which the plaintiffs are Texas cattle raisers; (3) and, *Ludvigson et al v. IBP*, in which four named plaintiffs seek to represent a nation-wide class consisting of sellers of fat cattle. The defendants common to the cases are four beef packers: IBP, MBPXL Corporation (MBPXL); Spencer Foods, Inc. (Spencer); and Flavorland Industries, Inc. (Flavorland). Each of the complaints alleges price-fixing and monopolization in violation of the federal antitrust laws, Sherman Antitrust Act, §§ 1 & 2, 15 U.S.C. §§ 1 & 2, particularly through the alleged manipulation of beef prices reported in the "Yellow Sheet", published by the National Provisioner, Inc., the leading meat price reporter. Each complaint alleges that there are other co-conspirators. The *Ludvigson* suit names two additional defendants: the Estate of Currier J. Holman, credited with masterminding IBP's phenomenal growth; and the National Provisioner, Inc., publisher of the Yellow Sheet. The three complaints state virtually the same operative facts and charges against the defendants.

No. 78-3345

This appeal involves the efforts of one of the four defendants, Spencer, to settle its liability in all three cases. In September 1977, the named plaintiffs in *Ludvigson* moved for certification of a class consisting of all persons engaged in the business of raising what is known in the cattle business as fat cattle and who have within the four years immediately preceding the filing of this action sold more than 100 head of fat cattle in

any one year. Before the court ruled on that motion, the plaintiffs in all three cases, after lengthy negotiations, made a settlement with Spencer. Negotiations began in February 1978. They were at arms-length and hotly contested. No other defendant was a part of the negotiations. The settlement agreement in substance provided that: (1) in return for a lump sum of $425,000, the plaintiffs' claims against Spencer in all three cases would be dismissed; and (2) Spencer would allow the plaintiffs access to its records and employees for discovery purposes.

On May 25, 1978, the trial judge met with counsel for the named parties to the settlement. Upon joint motion and stipulation by the plaintiffs and Spencer, he entered an order, "Order Conditionally Determining a Temporary Settlement Class and Tentatively Approving Proposed Settlement". The notice went to those persons whom the settling defendant, Spencer, agreed were the appropriate parties to receive notice.

The order created a temporary settlement class in *Ludvigson* "for purposes of this settlement" consisting of

> All persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers.

The order provided for notice to be sent to all members of this temporary class and fixed a hearing for August 11, 1978. The order also approved the form of notice drafted by the settling parties. The notice informed the class in detail of the terms of the settlement. It also stated that the $425,000 would be used to reimburse class and non-class plaintiffs for past and future litigation expenses and that therefore it was unlikely that any funds would be available for distribution to the class. On June 8 the district judge denied motions by the non-settling defendants seeking reconsideration of this order and seeking an opportunity to present evidence tending to show that the order was improper.

On August 11 the district judge held an extensive evidentiary hearing on the proposed settlement. The proponents presented evidence showing that (1) 54,800 notices had been sent; (2) about two percent of the class had opted out of the temporary settlement class and most of these were in other cases in the Beef Industry Litigation; (3) almost no class members had filed objections; and (4) Spencer was a relatively small firm[2] in bad financial shape and had received a takeover offer from a healthy company, Land O' Lakes Cooperative, conditioned on settlement of these three antitrust actions. W. D. Farr of Farr Farms Co. and Farr Feeders, Inc., affected class members, appeared and filed an objection. In addition, the non-settling defendants filed objections.

The trial court judicially noticed the evidence already before it concerning the propriety of class certification in *Becker v. Safeway Stores, Inc.*, the "retailer" cases.[3]

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[2] In 1977 Spencer lost over two million dollars; IBP had a net profit of thirty million dollars. App. 00197 et seq. Based upon net worth IBP was over 10 times larger than Spencer.

A footnote in Flavorland's brief, p. 4, states: "All four packer defendants have been the subject of takeover bids in recent years. The prices paid or offered in connection with those bids provide an instructive comparison as to the relative financial strength of the packer defendants. In May 1978, Land O' Lakes Corporation offered to acquire Spencer Foods for some $12 million. Aug. 11 Tr. at 78. In several transactions beginning in 1974 and ending in March 1977, Foxley & Co. purchased all of Flavorland's outstanding stock for slightly over $8,750,000. MBPXL was the subject of two competing tender offers in 1978, one by Cargill, Inc. for more than $67 million, Wall Street Journal, December 6, 1978, p. 40, and the other by ConAgra Inc. for about $65 million. Wall Street Journal, September 29, 1978, p. 6. Iowa Beef was the subject of a tender offer (which subsequently fell through) by Pacific Holding Corp. of $60 per share for the 82% of its stock not already owned by Pacific Holding. If all of Iowa Beef's common stock had been purchased at this price, the total Iowa Beef purchase price would have been over $300 million. Wall Street Journal, December 7, 1978, p. 6.

[3] See footnote 1.

The court took evidence from objectors Farr and IBP, through its general counsel, and from the settling defendant, Spencer, through its counsel. The court also heard from all counsel of record in attendance.

On August 21, 1978, the district judge determined the existence of a permanent settlement class and approved the proposed settlement. The court took judicial notice of the propriety of the similar class certification in *Becker v. Safeway Stores.* He found these factors favoring settlement: the uncertainty of trial of a complex matter; the continued denial of liability by the settling defendant; the substantial benefit to class members; the fact that other, more substantial defendants remained in the litigation; and the uncertain financial condition of the settling defendant. Those factors outweighed the argument against settlement. Accordingly, the court entered judgment on August 25. The non-settling defendant IBP appeals this judgment. So too do Farr Farms and Farr Feeders. MBPXL did not appeal.

I.

Standing and Unappealability of Order

A. As a non-settling defendant, IBP is not prejudiced by the settlement and therefore has no standing to complain about the settlement. *In re Nissan Motor Corp. Antitrust Litigation,* 5 Cir. 1977, 552 F.2d 1088. In *Nissan* purchasers of Datsun automobiles brought an antitrust action against Datsun dealers, Nissan Motor Corporation, and its Japanese parent, Nissan Motor Company, Ltd. The dealers and the plaintiffs agreed to an early settlement which the trial court, after a hearing, approved. Non-settling defendants were not present at the hearing. This Court noted: "Counsel for Nissan Japan and Nissan U.S.A. did not attend this hearing since [as non-settling defendants] they were not entitled to object to the merits of the proposed settlement. *See Seiffer v. Topsy's Int'l, Inc.,* 70 F.R.D. 622, 631 n.11 (D.Kansas 1976); *Wainwright v. Kraftco Corp.,* 53 F.R.D. 78, 81 (N.D.Ga. 1971); settlement approved, 58 F.R.D. 9, 11-12 (1973)." *Id.* at 1103 n.17.

In *Topsy's International* the court dismissed objections from defendants to a proposed settlement because they "lack[ed] any standing to even raise an objection" since they were not members of the class. 70 F.R.D. at 627, nn.5 & 6. In *Wainwright v. Kraftco*, the district court considered the propriety of a precertification settlement without giving notice to the non-settling defendants. Faced with objections to the proposed settlement, the court in *Wainwright* held:

> [f]irst, in a Rule 23(e) motion the parties with which the court is primarily concerned are the class of plaintiffs and the settling defendant. The non-settling defendants really have no standing to object to [the] settlement.

Id. at 81. Citing *Wainwright* and also *Philadelphia Electric Co. v. Anaconda American Brass Co.*, E.D.Pa.1967, 42 F.R.D. 324, Professor Newberg states with respect to class actions:

> Any party to the proceeding has standing to object to the proposed settlement. Thus, an objection may be registered by any class member . . [or] any settling defendant. . . . Finally, non-settling defendants in a partial settlement have no standing to object to the fairness or adequacy of the settlement, but they may object to any terms which preclude them from seeking indemnification from the settling defendants.

3 *Newberg on Class Actions* § 5660b at 564-65 (1977).

See also Ampicillin Antitrust Litigation, D.D.C.1979, 82 F.R.D. 652, in which Bristol-Myers, a non-settling defendant, objected to a proposed settlement between the plaintiffs and defendant Beecham. The court, citing *Nissan*, said: "It should be noted that Bristol has no standing to object to this settlement between Beecham and the . . . plaintiffs . . . Furthermore, it seems unlikely that its general objections were raised from any legitimate concern to protect the classes". *Id.* at 654-55.

In answer, IBP asserts that it does not challenge the settlement itself or the monetary adequacy of the

settlement, apparently admitting its lack of standing to attack the settlement on its merits. Instead, IBP challenges the *procedures* followed by the district court in approving it. But IBP cannot do indirectly what it may not do directly.

IBP points to *Nissan*, in which the non-settling defendants had standing to be heard on the form of notice to be sent to class members concerning a partial settlement. In that case, however, the members of the class received a "combination" notice not only of the proposed partial settlement, but also of the district court's certification of a *litigation* class under Rule 23(b)(3) and the class members' right to "opt out". Unlike the situation here, therefore, in *Nissan* non-settling defendants were directly affected by the notice.

B. In any event, the district court's order is not final as to the non-settling defendants and is therefore unappealable. *Darrow v. Southdown, Inc.*, 5 Cir. 1978, 574 F.2d 1333, involved a similar situation. In *Darrow*, two district courts had approved partial settlement of class action shareholder derivative actions without holding any hearings. Mize and Addis, two defendants, appealed the judgment not as defendants but as security holders of the corporation. They objected to the court's failure to articulate the reasons in support of its approval. This Court held that "on principles akin to standing, Mize and Addis cannot object to the settlement". *Id.* at 1336. We explained:

> Because Mize and Addis remain defendants in the suits, they cannot appeal the judgments as defendants aggrieved by its terms. The District Courts' judgments are not final under 28 U.S.C. § 1291 as to Mize and Addis. *Goldstein v. Andresen & Co.*, 5 Cir. 1972, 465 F.2d 972, 973, holds that a partial settlement among some plaintiffs and defendants is final "as to the rights and liabilities of the settling parties (none of whom seeks to appeal) because it effectively terminates the controversy

> among them." As to the parties among whom live controversies remain, such order is nonappealable because it does not end the litigation by finally determining the rights of those parties.
>
> Mize or Addis may, of course, appeal from any final judgment rendered in the portions of the suits left open for trial. However, such an appeal will not involve the validity of the settlement or the procedures followed in its approval.

Id. at 1336 n.3.

In *Goldstein v. Anderson*, cited in *Darrow*, we held that, "As to [the non-settling defendant] the order does not 'end the litigation by fully determining the rights of the parties' and is therefore not appealable." 465 F.2d at 973. We have exactly the same situation in this litigation with respect to the non-settling defendants.

Affected members of the plaintiff class, Farr Farms and Farr Feeders, have full standing to appeal the merits of the agreement and the procedures relating to its approval by the court. Notwithstanding the dismissal of the defendant IBP's appeal, the Court must consider the issues raised by IBP because Farr Farms and Farr Feeders have adopted the arguments in IBP's briefs.

II.

Temporary Settlement Class

One of the most controversial issues in the management of complex class-action litigation is whether a district court, in certain circumstances, should recognize a tentative or temporary settlement class for the approval or disapproval of a precertification settlement. The objectors rely heavily on the Manual For Complex Litigation (4th Ed. 1977) (Manual), published under the aegis of the Federal Judicial Center. Professor Arthur R. Miller, who served as a special consultant on the original Manual and each successive revision, has written, "personally, I have always found this to be a

close debate".[4] Miller, An Overview of Federal Class Actions: Past, Present and Future (Fed. Jud. Center 1977). The Manual states the case strongly against the practice of forming a temporary settlement class before certification:

> There is, to say the least, serious doubt that this practice is authorized by Rule 23 as amended, even if it is conceded that the courts are expected to develop new methods of employing the amended Rule 23.
>
> Consideration of this practice in view of the provisions of Rule 23 and experience to date leads to the conclusion that *tentative classes for the purpose of settlement * * * should not be formed.*

Manual § 1.46 at 60.

In resorting to the Manual for guidance, however, judges and lawyers should bear in mind that the Board of Editors of the Manual was careful to say in the Foreword to the fourth edition:

> This Manual is designed also to stimulate the devising of procedures appropriate in solving new problems as they arise. It is intended to be a living document into which desirable techniques proved by experience will be incorporated in the future. Rarely does complex litigation follow a set pattern. Accordingly, flexibility should be the keynote in applying the suggestions contained in this Manual.

Manual at xx. This language carries forward the thought expressed by Chief Judge Alfred P. Murrah in

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[4] Professor Miller concluded, however: "I have become convinced in recent years that there really is a serious problem of the judge not having enough information prior to certification to do a completely effective job under Rule 23(e). What is clear, is that if the court is going to consider a proposed settlement prior to formal certification, he is advised to demand a full presentation on all of those aspects of certification bearing on an adequacy of representation and class homogeny. Ironically, if he does, he might as well complete the Rule 23(c)(1) process." Miller, An Overview of Federal Class Actions: Past, Present and Future 60 (Fed. Jud. Center, Dec. 1977).

the Foreword to the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, issued in 1960, 25 F.R.D. 351: "[I]t contains neither a simplified outline for the easy disposition of complex litigation nor an inflexible formula or mold into which all trial and pre-trial procedure must be cast. Rather, it is a collection of procedures which are 'Recommended,' because as the product of experience and the development of able minds, they are deemed worthy of consideration by all." Manual at xix.

The recommendations of the Manual in § 1.46 are intended to prevent collusion, individual settlements, "buy-offs" where the class action is used to benefit some individual at the expense of absent members, and other abuses. See Appendix to this opinion for the complete list of reasons the Manual gives for its position. Here the absence of abuse of the class action and the district court's close supervision of the parties make the recommendations inapplicable. (1) The court found that the settlement was "not collusive". (2) One small defendant settled; another small defendant, Flavorland, is in the process of settling. The plaintiffs made clear to the court that they intend to pursue their claims against the non-settling defendants. (3) The proceeds of the settlement cannot be used to pay plaintiffs' attorney's fees. (4) Spencer had suffered a sharp decline in its net income and net worth but had received a tender offer from Land O' Lakes Cooperative, a financially strong cooperative, conditioned upon Spencer's prompt settlement of the antitrust actions. (5) The parties to the settlement had kept the court informed during their negotiations. The court here held an extensive hearing to determine not only the fairness of the settlement but also to make sure that the plaintiffs did not benefit at the expense of absent class members. (6) Underlying the special circumstances in the case is the general consideration that courts favor settlement. Parties to a dispute should be able to settle it themselves without interference from nonprejudiced third parties, especially when the settling parties are acting under judicial scrutiny.

The fears expressed in § 1.46 of the Manual, based on the experience of judges and lawyers familiar with complex litigation, should, of course, be given weight by any trial judge considering a tentative or temporary pre-certification settlement class. Judges and commentators, however, take a more flexible position than the Manual. It is fair to state that as the law now stands, tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge. Those conditions are met here.

Professor Hubert B. Newberg, in his comprehensive treatise, Class Actions (1977), disagrees with the position taken in the Manual—at least to the extent that it may be construed as inflexible. He writes:

> In many practical respects the Manual's position is questionable. In regard to the assurance of adequate representation, the Manual ignores the court's role to assure protection of the rights and interests of the absent class members in all phases of class action litigation. Further, the formation of a tentative class does not deny the members of the class an opportunity to show the inadequacy of representation. A class member may attack the adequacy of representation (1) through objections to the settlement, (2) on appeal after approval of the settlement, (3) by collateral attack, or (4) pursuant to Rule 60(b). The Manual also assumes that the scope, identity of membership, aggregate and individual claims, and the presence or absence of conflicting interests within the class cannot be determined without a hearing. These assumptions may or may not be valid.
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> . . . . .
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> At the present time, the Manual's position discouraging any settlement negotiations before a formal class ruling appears to undercut other general policies encouraging settlements, and would instead interject an inflexible rule that may well be

> counterproductive in numerous situations. The influence of the Manual's posture in this regard remains to be tested in the courts.

3 Newberg, Class Actions § 5570(c) at 475-76.

Law review comment seems to encourage, in proper circumstances, the creation of a temporary settlement class. "So long as neither abuse of the class action device nor prejudice to the class members appears possible, such a settlement [prior to class certification] should be encouraged since it can spare the court from managing a complicated and time-consuming item of litigation." McGough and Lerach, *Termination of Class Actions: The Judicial Role*, 33 U.Pitt.L.Rev. 445, 457 (1972). Again: "[w]hen all class members have individually recoverable claims, a tentative settlement class may be acceptable. In that situation, class members have a genuine option to opt out of the settlement and can benefit from specific knowledge of the amount of recovery they can expect from remaining in the class. Moreover, since a class member with a recoverable claim is likely to have his own attorney and an incentive to investigate his claim, he may be able to make an effective evaluation of the settlement despite the lack of information supplied by the negotiating parties. To the extent that absentees are able to exercise supervision over the settlement, the weak posture of the judge becomes less troubling. On the other hand, large claimants might be able to gather even more detailed information about the actual negotiations if there is early certification with the opportunity to intervene. In addition, an absentee might have his own suit delayed if all similar cases are consolidated for pre-trial proceedings and the judge refuses to allow any discovery until the tentative class settlement has been negotiated. On balance, however, these costs would appear to be offset by the advantage of being able to opt out with knowledge of the benefits of remaining in the class." Comment, *Developments—Class Actions*, 89 Harv.L.Rev. 1318, 1557. *See also* Note, *The Tentative Settlement Class and Class Action Suits under Title VII of the Civil Rights Act*, 72 Mich.L.Rev. 1462, 1471 (1974).

The cases confirm the commentaries.[5] *City of Detroit v. Grinnell*, 2 Cir. 1974, 495 F.2d 448, involved a partial class action settlement before certification. The settling parties "assumed the existence of a proper class under Rule 23" and "the District Court acquiesced in that assumption." *Id.* at 464. At issue was a national class antitrust action in which the plaintiffs and four separate defendants reached settlement after argument, but before the the court ruled, on plaintiffs' class action motion. The trial court approved a proposed partial settlement over the strenuous objections of several members of the temporary settlement class. On appeal, the objectors argued that this was contrary to the *Manual*. The Court affirmed. The Court noted that the principal basis for the negative posture of the *Manual* was that at the early stages of a dispute the plaintiffs' counsel is under strong pressure to conform to the defendants' wishes. *Id.* at 465, citing *Ace Heating & Plumbing Co. v. Crane Co.*, 3 Cir. 1971, 453 F.2d 30. The *Manual* is thus concerned with premature, inadequate settlement.

In *Grinnell* the court found that: (1) the litigation had been pending for four years before the settlement; (2)

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[5] The following cases are examples of the use of a temporary settlement class in class actions: *Girsh v. Jepson*, 3 Cir. 1975, 521 F.2d 153; *Grunin v. International House of Pancakes*, 8 Cir. 1975, 513 F.2d 114, *cert. den'd* 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93; *Greenfield v. Villager Indus.*, 3 Cir. 1973, 483 F.2d 824; *Brucker v. Thyssen-Bornemisza Europe, N.V.*, S.D.N.Y.1976, 424 F.Supp. 679, *aff'd*, 2 Cir. 1977, 559 F.2d 1202; *Alaniz v. California Processors, Inc.*, N.D.Cal.1976, 73 F.R.D. 269, *modified*, 73 F.R.D. 289; *In re National Student Marketing Litigation*, D.D.C. 1974, 68 F.R.D. 151; *Stabler Construction Co. v. R. G. Sloane Mfg. Co.*, C.D.Cal.1974, No. 71-1589-ALS; *Colson v. Hilton Hotels Corp.*, N.D.Ill.1972, 59 F.R.D. 324; *Altman v. Liberty Equities Corp.*, S.D.N.Y.1972, 54 F.R.D. 620; *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, E.D.Pa.1971, 322 F.Supp. 834; *Nurseryman's Exchange, Inc. v. Yoder Bros.*, N.D.Cal.1971, No. C-70-1510; *West Virginia v. Charles Pfizer & Co.*, S.D.N.Y.1970, 314 F.Supp. 710, *aff'd*, 2 Cir. 1971, 440 F.2d 1079, *cert. den'd*, 1971, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115; *In re Plumbing Fixture Cases*, J.P.M.D.L.1968, 298 F.Supp. 484, 488.

there were not "several different counsel vying for recognition as class representatives"; and (3) the defendants could not play one named representative plaintiff off against another potential representative. *Id.* at 465. Similarly, (1) Spencer's settlement was achieved only after several years of pending litigation; (2) there were not different counsel vying to be class counsel; and (3) Spencer did not play any plaintiffs off against each other. Thus, as in *Grinnell*, "the major concern of the Manual for Complex Litigation's recommendation against conditional approval of a viable class is absent in this case". *Id.* at 465.

The Second Circuit also addressed in *Grinnell* the additional concerns of the *Manual* relative to temporary class members being forced to accept settlement absent an informed choice. The *Grinnell* court found that the settlement avoided the Manual's concerns since:

> "it provided for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement."

Id. at 466. In the instant matter the creation of a temporary settlement class was undeniably necessary to carry out the settlement agreed upon by the parties. The temporary settlement class was carefully defined by the trial court, and the terms of settlement were subject to modification after a full hearing. The settlement itself did not provide for the disbursement of funds to named plaintiffs or class members. The trial court suggested that it would hold additional hearings and would carefully supervise the expenditure of funds. Tr. at 135; 164. Significantly, trial counsel could *not* utilize the settlement fund for attorneys' fees. As the court in *Grinnell* described the Manual's recommendations:

> It must also be remembered that these recommendations were not meant to be intractable rules. *If they were applied blindly and without an appreciation of their implicit limitations in given circumstances*, they might well jeopardize the right of many plaintiffs to recovery and even invite the

> likelihood that certain class action suits might never be settled at all.

Id. (Emphasis added.)

The objectors attempt to distinguish *Grinnell* on the ground that all four defendants agreed to the settlement; here, the settlement was partial. They also assert that Professor Newberg and the other commentators were concerned only with complete settlement of a class action. They say that "partial settlements will result in little, if any, reduction of a complex class action". We are not impressed with this difference in the cases. The settlement was complete as to the settling defendants and reduced the burden of the settling plaintiffs. For Spencer the settlement was a condition to acceptance of the tender offer made to it. There is nothing in the cases or in the commentaries to suggest that approval of a pre-certification settlement class as a proper legal instrument is based on the settlement being complete as to all the parties.

The non-settling defendants have not lost any of their rights. The judgment of August 25, 1978, declaring the "Temporary Settlement Class" to be the "Permanent Settling Class" and approving the "Covenant Not to Sue and the Settlement Agreement" in terms is applicable only "for the purposes of the settlement of the class action as to defendant Spencer Foods, Inc.".

A number of trial judges, experienced in complex litigation, have found it appropriate to establish a pre-certification settlement class.[6] In the *In Re Home-Stake Production Company Securities Litigation*, N.D.Okl.1977, No. 75-C-430, for example, Judge George H. Boldt acknowledged that the Manual "cautions against the certification of a class solely for settlement purposes" but decided that in view of the "extraordinary circumstances . . . where the class issues have been thoroughly briefed and argued and substantial discovery on the underlying facts has been taken such a certification is appropriate". *In the Ampicillin Antitrust Litiga-*

[6] See footnote 5.

tion, D.D.C.1979, 82 F.R.D. 652, Judge Charles R. Richey approved a preliminary settlement class and denied the standing of a non-settling defendant to object to the proceeding. In this case, too, as pointed out, the trial judge, Judge William H. Taylor, had extensive experience in the "retailer" Beef Industry Antitrust Litigation.

When a court orders that a notice of a proposed class settlement be sent to members of a temporary settlement class, the order carries the necessary implication that the action complies with Rule 23. Very seldom does the court articulate this determination. It did so, however, in the *Four Seasons Securities Laws Litigation*, W.D.Okl.1972, 58 F.R.D. 19, 32: "The court found and determined that for the purpose of effectuating the proposed [certification], the prerequisites set out in Rule 23(a) and (b)(3) were met with respect to each of the two classes established by the order." *See also Alaniz v. California Processors, Inc.*, N.D.Cal.1876, 73 F.R.D. 269, 275.

Rule 23 does not deal specifically with a tentative settlement class. "However, a tentative class would appear to be a form of conditional certification, sanctioned by Rule 23(c)(1)". Comment, *Developments—Class Actions*, 89 Harv.L.Rev. 1318, 1357 n.11 (1976). Rule 23(c)(1), in pertinent part, reads: "An order [determining whether a class action is to be so maintained] under this subdivision may be conditional, and may be altered or amended before the decision on the merits." *See, e.g., Esplin v. Hirschi*, 10 Cir. 1968, 402 F.2d 94, 99, *cert. denied*, 1969, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969); *Dolgow v. Anderson*, E.D.N.Y.1971, 55 F.R.D. 664, 667, *aff'd*, 2 Cir. 1972, 464 F.2d 437.

Professor Newberg also considers tentative temporary settlement classes within the ambit of Rule 23. "On analysis", he perceives "the temporary settlement class as nothing more than a tentative assumption indulged in by the court to facilitate the amicable resolution of the litigation, rather than as some sort of conditional class

ruling under Rule 23 criterion". 3 Newberg, Class Actions § 5570c at 476. We agree with his summation:

> A blanket rule prohibiting the use of temporary settlement classes may render it virtually impossible for the parties to compromise class issues and reach a proposed class settlement before a class certification. Such a firm restriction does not appear necessary or desirable. The hallmark of Rule 23 is the flexibility it affords to the courts to utilize the class device in a particular case to best serve the ends of justice for the affected parties and to promote judicial efficiencies. A rule prohibiting temporary settlement classes altogether directly eliminates an important segment of court flexibility in administering and managing a class action to its successful disposition.
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> By analogy, for example, Rule 23(c)(1) and (d)(4) authorize a class ruling to be altered or amended by the court at any time before a judgment on the merits. Accordingly, it is altogether proper and consistent for a court to certify a class for settlement purposes, while it might have had more difficulty reaching this determination in a different context. Temporary settlement classes have proved to be quite useful in resolving major class action disputes. While their use may still be controversial, most courts have recognized their utility and have authorized the parties to seek to compromise their differences, including class action issues, through this means.

Id. at 479-80.

We hold that in this case a tentative or temporary settlement class was proper.

III.

Definition of the Temporary Settlement Class; Notice

The May 25, 1978, order and the notice sent to the temporary settlement class defined the class as:

> "All persons, except defendants, who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question sold more than 100 head of fat cattle per annum in any year since January 1, 1968, including all persons who have sold fat cattle to the defendants and their suppliers."

The objectors contend that this definition is ambiguous, particularly because of the term "fat cattle". The non-settling defendants are not affected by this definition, for the class consists only of the plaintiffs settling with Spencer. Spencer, a major purchaser of fat cattle, approved the class. Farr and Farr Farms had the option to opt out of the class.

The interests of justice require the protection of absentee members. But the determination of a class and the manner of notice are matters within the trial court's judicial discretion. Our examination of the record leads us to conclude that the trial judge did not abuse his discretion as to either.

Fat cattle are standardized cattle which have been placed on a high energy feed for fattening to an optimum weight for sale; the bench mark for fat cattle is U.S.D.A. Choice Grade 3. The term is sufficiently well known and the cattle sufficiently fungible for the Chicago Mercantile Exchange to have a commodities contract for "fat cattle". The trial court had ample evidence that persons receiving notice knew what was meant by the term.

The objectors argue that the notice was ineffective because it did not reach many of the persons who belonged to the 'class". The settling parties stipulated that the mailing list to be used for disseminating the notice would be the mailing list of subscribers to the *Beef* Magazine supplemented by a list of persons who

sold cattle to Spencer during the period in question. The *Beef* list contained approximately 40,000 names and, when supplemented by the names supplied by Spencer, came to a total of 54,808. There was testimony by the vice-president of the publishing company, that the magazine is distributed primarily to persons who are operators of commercial feedlots and farmer feeders. He added that the magazine is designed to "reach persons who make management decisions in feedlot operations." The advertising director said that *Beef* is designed to reach persons with "control over the feeding systems, the animal health products that are used . . ."—in other words, the persons in actual physical control of the animals. He also testified that it has coverage of over 90 percent of all fat cattle sold and 90 percent of the persons who raise and feed them.

Rule 23(b)(3) requires that the best notice practicable under the circumstances be provided to those persons "who are identifiable through reasonable effort" F.R.C.P. 23(b)(3); *Nissan Motor Corporation*, 5 Cir. 1977, 552 F.2d 1088, 1097. In the *Eisen* litigation, the Supreme Court found reasonable effort had been made when only 2,500,000 of the potential 6,000,000 class members could be easily identified by name and mailing address. *Eisen v. Carliste & Jacquelin*, 1974, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732. "Obviously the word 'reasonable' cannot be ignored. In every case, reasonableness is a function of anticipated results, costs and amount involved." *Nissan* at 1099. Although the objectors complain that notice was insufficient, they cannot point to a source for additional names and addressees.

The trial court specifically found in its "Order Conditionally Determining a Temporary Settlement Class and Tentatively Approving Proposed Settlement" that class members were sufficiently identified to receive adequate notice by mail, that such notice was the best notice practicable in the circumstances, and that it was in compliance with Rule 23(c)(2) of the Federal Rules of Civil Procedure. The court did not abuse its discretion in approving the manner of notifying the members of the settlement class.

IV.

Conflict of Interest

A. The objectors contend that the class representatives in *Ludvigson* have an inherent conflict of interest; that they used the threat of class certification to coerce Spencer into settling for a larger amount than they would otherwise be able to obtain. We fail to see how the non-settling defendants can complain about the settling defendant paying too much—or complain that Spencer was coerced; Spencer was anxious to settle. Spencer insisted on approval of the temporary settlement class as a pre-requisite to settling and the settlement itself was consistent with Spencer's demands. Nor can the Farr companies, class members who benefitted from the settlement, complain. Indeed, they have never challenged the merits of the settlement.

The objectors argue that three of the four named plaintiffs in *Ludvigson* have outside entanglements which call into question their ability to represent the class. No objection is made to the fourth representative and, of course, one person may represent a class. None of the three others has any other litigation against Spencer, IBP, or any of the other named defendants. The *MPIA* and the *Ludvigson* class actions complaints filed against the packers are almost identical and ask for the same types of relief. That the representatives have litigation pending against the retailers, does not put them in conflict with other class members. All of the class members have some sort of interest in the litigation against the retailers.

We agree with the trial court that no conflict of interest is produced by the plaintiffs settling with Spencer in all three cases, only one of which is a class action. The trial court has deferred any consideration for the disbursement of funds until the cases against all defendants are terminated. If any conflict should arise, the trial court has authority under Rules 23(c)(4) and 23(d)(2) to create subclasses and to issue protective orders. The settlement funds have been deposited in es-

crow and are subject to disbursement only upon order of the trial court.

We hold that the trial court did not abuse its discretion in determining that there was no conflict of interest as to the class representatives and their counsel.

V.

Fairness of Settlement

"[I]n determining whether to approve a proposed settlement, the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable and is not the product of collusion between the parties." *Cotton v. Hinton*, 5 Cir. 1977, 559 F.2d 1326, 1330. The district court here found that the settlement was "fair, adequate and reasonable, is not collusive, and reflects all the normal perils of litigation as well as the additional uncertainties inherent in complex class action". In *City of Detroit v. Grinnell*, 2 Cir. 1974, 495 F.2d 448, 455, the Court, which upheld a temporary settlement class, made the statement, and we agree, "so much respect is accorded the opinion of the trial court in these matters that the Court will intervene in a judicially approved settlement of a class action only when objectors to that settlement have made a clear showing that the District Court abused its discretion". *Accord, Young v. Katz*, 5 Cir. 1971, 447 F.2d 431, 433.

The instant case had been pending for nearly three years at the time of the settlement hearing. Extensive discovery had been conducted. Moreover, the court took judicial notice of discovery in the companion "retailer" cases in the Beef Industry Antitrust Litigation, which had also been pending for several years. The settling parties had fully advised the court of the reasons for the settlement and the status of the negotiations for settlement.[7] In addition to the usual

[7] Copies of the settlement papers were submitted to the trial judge for his review. He expressed several concerns, which resulted in modification of the agreement.

elements of any compromise there were several significant elements present in this case. (1) Unrebutted testimony convincingly demonstrated the financial necessity of Spencer's settling; and $425,000 was a large sum from a firm in Spencer's financial position. There was a strong likelihood of Spencer's closing its plants in Iowa and Nebraska should it not be able to accept a tender offer conditioned on settling the antitrust action. Closing of the plants would have left no packer of any size left in the area to compete with IBP; a farmer's cooperative competing against IBP would be beneficial to cattlemen in Iowa and Nebraska.[8] (2) Spencer agreed to assist the plaintiffs in discovery and in providing access to witnesses. (3) No attorneys' fees are to be paid from the settlement fund. No sums are to be withdrawn from the fund without an order of court. The settlement will materially aid the plaintiffs in their litigation against the non-settling defendants. (4) There were virtually no objections from members of the settlement class. There were only three objectors from the class: one did not press his objections at the hearing or appeal; one was counsel for IBP, although a member of the class; one was Farr, speaking for his companies, who did not object to the merits of the settlement or even to the procedure, but seemed to be opposed to the lawsuits generally as harmful to cattlemen and the cattle industry.[9] Only 2.5 percent of the 54,808 who received

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[8] In *In re National Student Marketing Litigation*, 68 F.D.R. 151, 156 (D.C.D.C.1974) the district court approved a settlement between the plaintiffs and one of the defendants primarily because the settlement was an "economic necessity, the approval of which will hopefully remove a major roadblock from [the defendant's] attempt at financial recovery."

[9] On cross-examination, for example, W. D. Farr testified that he did not agree with the complaint in the packers case because he didn't believe there was any basis for it (Tr. at 31.) In an affidavit filed several months prior to settlement, Farr stated:

(Footnote continued on following page)

notice of the proposed settlement opted out. As the trial judge noted in his order, "Opportunity to be heard was afforded to any person who wished to be heard". Indeed, notwithstanding the trial judge's doubt as to the standing of the non-settling defendants, he allowed the general counsel for IBP to testify and counsel for the non-settling defendants to participate in the argument.

We hold that the district court acted well within its discretion in this case in ordering a temporary and permanent settlement class and in approving the settlement agreement between the plaintiffs and Spencer.

The appeal of IBP is dismissed. The judgment of the district court is AFFIRMED.

79-1010

This matter resembles No. 78-3345 in that it too involves an attempt by one of the relatively small defendants, Flavorland, to settle its liability in all three lawsuits. To the extent the issues are the same as those raised in 78-3345, our holdings in that appeal apply to this appeal.

Unlike the other packer defendants, Flavorland is privately owned. It is about the same size as Spencer.[10] IBP and MBPXL are several times Flavorland's size and have much greater resources. Flavorland has been sharply contracting its business operations and in recent years has closed or sold five of its seven plants. After extensive negotiations between Flavorland and the plaintiffs they reached agreement on a settlement of the three lawsuits. Flavorland would pay the plaintiffs $750,000 in three equal annual payments and would provide the

[9] *continued*
"I am opposed to these lawsuits. I believe they are harmful to cattlemen, they fail to deal with the problems of the cattle industry, and that there is no factual basis for the lawsuit." App.—00479.

[10] See footnote 2.

plaintiffs with additional discovery after certification of a permanent settlement class. On December 21, 1978, the district court conditionally approved a temporary settlement class defined as

> consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and who have in the period in question in the complaint sold more than 100 head of fat cattle in any year since January 1, 1968, to any packers in the United States or their suppliers, including without limitation all persons who have sold fat cattle in any quantity during such period to the defendants or their suppliers.

The court directed the mailing of notice to the class, approved the form and method of notice, and scheduled a hearing for February 15, at which the settling parties could make a full record in support of the settlement and the absent members could present any objections they might have. Only after this hearing would the district court approve or disapprove the proposed settlement class and settlement.

The non-settling defendants, IBP and MBPXL appealed, that order. IBP, but not MBPXL, moved in district court to stay the mailing of the notice to the temporary settlement class pending this appeal. The district court denied the motion December 29, 1978, in an order finding that "no legal prejudice to [IBP] could occur until after the hearing which is presently set for February 15, 1979", and that "there is doubt as to the standing of [non-settling] defendants to object in this case to settlement by another defendant". By order dated January 12, 1979, this Court ordered that the appeal be expedited, consolidated this appeal with No. 78-3345 and No. 78-3346, and stayed the mailing of the notice to the settlement class. The effect of this stay was, of course, to stay the hearing on the approval or disapproval of the settlement class and the settlement.

The settling parties have not reached first base. They are at the initial stage when the district court has con-

ditionally approved a temporary settlement class subject to disapproval or redefinition at a later hearing. The settlement has not been approved and is subject to disapproval or modification at a later hearing. In contrast, in *Spencer* there has been a full hearing and the district court has approved a permanent settlement class and the settlement reached by the parties.

To be appealable as a "final decision" under 28 U.S.C. § 1291, a district court order must "of its own force terminate the entire litigation". *Coopers & Lybrand v. Livesay*, 1978, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357; *Cason v. Owen*, 5 Cir. 1978, 578 F.2d 572, 573. An order is not appealable under 28 U.S.C. § 1291 unless "it ends the litigation on the merits and comprehends only execution of the court's decree." *Dunlop v. Ledet's Foodliner, Inc.*, 5 Cir. 1975, 509 F.2d 1387, 1389. Moreover, even an order which ends the litigation as to one defendant is not appealable under 28 U.S.C. § 1291 by another defendant as to whom the order does not finally terminate the litigation. Thus, in *Goldstein v. Andresen & Co.*, 5 Cir. 1972, 465 F.2d 972, 973, this Court dismissed for want of a final order an attempted appeal by a non-settling defendant from district court approval of a settlement agreement involving another defendant.

IBP asks this Court to apply the "collateral order" doctrine first enunciated in *Cohen v. Beneficial Loan Corp.*, 1949, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1536-37. That doctrine is inapplicable in this case.

As we said in *Western Electric co. v. Milgo Electronic Corp.*, 5 Cir. 1978, 568 F.2d 1203, 1207: "To preserve even attenuated notions of finality, the collateral order doctrine requires a final disposition of the question by the district court, not a disposition that is 'tentative, informal, or incomplete.' " *Clark v. Lomas & Nettleton Financial Corp.*, 5 Cir. 1978, 581 F.2d 516, involved an attempt to appeal from a district court order tentatively approving the settlement of a shareholders' derivative action and setting a date for a

hearing to determine whether the settlement should be given final approval. In dismissing the appeal for want of an appealable order, this Court reasoned: "It is equally clear that the order is not appealable under the collateral order exception of *Cohen v. Beneficial Loan Corp.* . . . Even if we conclude that the order is final and collateral the order before us falls far short of meeting the remaining requirements contemplated by *Cohen*." 581 F.2d at 517 (citations omitted).

In *Coopers & Lybrand v. Livesay*, 1978, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 the Supreme Court was faced with the question whether an appeal would lie from a district court order *refusing* to certify a lawsuit as a class action under Rule 23. After first ruling that the order could not be appealed as a "final decision" under 28 U.S.C. § 1291, the Supreme Court then held that the order was also not appealable under the collateral order doctrine:

> "To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Second, the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. For these reasons, as the courts of appeals have consistently recognized, the collateral order doctrine is not applicable to the kind of order involved in this case."

437 U.S. at 468-69, 98 S.Ct. at 245. (citations and footnotes omitted).

Here, we have an *a fortiori* case for non-appealability in that Judge Taylor's order does not purport finally to determine the class certification question but merely gives conditional approval to the formation of a temporary class with respect to a settlement involving a single settling defendant.

Weit v. Continental Illinois National Bank Co., 7 Cir. 1976, 535 F.2d 1010, involved an attempted appeal by the plaintiffs from a district court order which had largely accepted the defendants' proposals as to the methods of notifying the class. In holding the collateral order doctrine inapplicable and dismissing the appeal, the court said:

> The *Cohen* exception, commonly called the collateral order doctrine, does not reach those orders which are merely steps toward final disposition of the merits of the controversy, nor those that do not involve important and unresolved legal questions ... The questions decided against the plaintiffs will not conclusively settle any issue other than the propriety of the notice in this particular case under the facts here involved. If review were to be granted on this appeal, we see no reason why almost every order specifying the form and content of notice in a class action would not be appealable. Such a result would not be compatible with the strong federal policy against most interlocutory appeals, and the sound reasons for the final judgment rule.

535 F.2d at 1014-15 (citations omitted).

We consider it unnecessary to discuss the other issues this appeal raises. The appeals of IBP and MBPXL are DISMISSED.

78-3346

Four days before the August 11 hearing on the Spencer settlement, IBP moved for leave to amend its answers in the three cases to assert a cross-claim for equitable contribution against Spencer. On September 1,

1978, the trial court denied the motion, holding that in an antitrust action a defendant has no right of contribution against co-defendants.

This Court has recently held that an antitrust defendant has no right of contribution against his co-conspirators. *Abraham Corp. v. Texas Industries, Inc.*, 5 Cir. 1979, 604 F.2d 897. That decision controls this case.

The judgment of the district court is AFFIRMED.

* * *

These three matters are remanded to the district court for proceedings consistent with this opinion.

APPENDIX

Manual for Complex Litigation
§ 1.46, p. 60.

Several reasons support this conclusion. (1) Rule 23 does not authorize formation of tentative classes for the purpose of settlement. (2) There can be no assurance that the class members will be adequately represented in the settlement negotiations until the findings which are a condition precedent to the formation of a class are made by the court after an opportunity for an evidentiary hearing. Formation of a tentative class for the purpose of settlement with a requirement that the class member accept the settlement or opt out and litigate independently denies to the members of the class the opportunity to show the inadequacy of the representation of the class by the representative party or parties agreeing to the settlement and their counsel. (3) The appropriate membership of the class and the identity of the members cannot be determined in the absence of an opportunity for hearing and judicial findings of fact and conclusions of law. Nor can there be any assurance that the tentative class will be composed of interests which are not conflicting. Absent such findings and conclusions it will be impossible to determine how many members there are in a class, who they are, the aggregate of claims of all members of the class, the amount of the individual claim of each member in relation to the total

claims of all members of the class and, therefore, the amount of money which will be payable to each member of the class. This information would seem to be essential to making any rational choice whether to remain in the class and accept the benefits of the settlements or to opt out. (4) In the absence of the development of the information relevant to liability, damages, and the expense of preparation for trial and of trial, there cannot be a fair recognition in settlement negotiations of the potential liability of the party or parties opposing the class and the potential damages that might be recovered for the class. (5) Formation of such a class preempts determination of the question of whether the claim for relief should be litigated for the members of the class or should be the subject of further pretrial preparation with a view toward securing a better settlement or a trial on the merits; and it also preempts the question of what parties and counsel should represent the tentative class since there must be an unofficially negotiated earlier settlement for the purpose of the tentative formation of the class. (6) The formation of a tentative class for the purpose of settlement denies to the class member the choice contemplated by amended Rule 23 to become a member of the proposed class for the purpose of litigation with adequate representation as a member of a litigating class. (7) Formation of such a class denies to a member of the class the right to appear in the action as a party and to maintain the position of a litigating party. (8) Formation of such a class results in a long delay in preparation of the case for trial of those parties who desire to litigate their claims for relief. (9) In the absence of reasonable discovery conducted on an adversary basis by counsel representing the class, it is impossible to determine whether the proposed settlement has any relation to the economic facts of life relevant to the case.

It has been suggested that the foregoing opposition to the formation of tentative classes for the purposes of settlement constitutes a hostility to settlements which is unknown to the law generally where settlements are

favored. But settlement of class actions is a most sensitive area. Simply because the action is a prospective class action "the named plaintiffs have additional leverage when negotiating for settlement of their individual claims."[124] And it would be unfair to permit defendants to settle under threat of a class action which may not really exist.

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APPENDIX B

Sherman Act

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 2.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. § 15.)

Federal Rule of Civil Procedure 23

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the

interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

No. 79-1214

OCT 1 1980

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

Iowa Beef Processors, Inc., et al.,

Petitioners,

vs.

Meat Price Investigators Ass'n, Darrell Cameron, and Don Ludvigson, et al.,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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October 1, 1980

TABLE OF AUTHORITIES

Cases	PAGE
Deposit Guaranty National Bank v. Roper, ... U.S. ....., 100 S.Ct. 1166 (1980)	3
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)	3
Westvaco Corp., et al. v. Adams Extract Co., et al., No. 79-972	1, 2, 3
Wilson P. Abraham Construction Co. v. Texas Industries, Inc., No. 79-1144	1, 2

Rules	
Rule 23, F.R.Civ.Proc.	3
U.S. Supreme Court Rule 22.6	1

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Pursuant to Rule 22.6, petitioners call the Court's attention to certain recent developments which indicate that this petition should now be granted.

This is one of three cases in which certiorari petitions were filed to determine whether a right of contribution exists among antitrust defendants. On June 16, 1980, this Court granted certiorari in *Westvaco Corp., et al. v. Adams Extract Co., et al.*, No. 79-972, to resolve the conflict among the circuits on that issue. This case and *Wilson P. Abraham Construction Co. v. Texas Industries, Inc.*, No. 79-1144, are being held pending decision of *Westvaco.*

However, it now appears that the *Westvaco* petition either has become moot or must be dismissed as improvidently granted because the sharply adversary positions which are a jurisprudential requirement for this Court's decision of such a difficult and important issue no longer exist. (See the Motion of Certain Respondents to Dismiss the Writ of Certiorari, filed September 24, 1980 in *Westvaco*.)

Given the current confusion in *Westvaco* and the possibility that the petition in that case may shortly be dismissed, petitioners suggest that certiorari should now be granted in this case to insure that the status of antitrust contribution will be resolved during this Term. This case raises the contribution question in precisely the same procedural context as *Westvaco*: non-settling defendants seeking to protect their interests when the plaintiffs enter into cheap, early settlements with certain other defendants. This is also the context in which antitrust contribution will most commonly be sought.[1]

Indeed, this case presents an even better occasion for resolving the conflict than *Westvaco*. Unlike *Westvaco*, this case clearly presents the contribution issue not only in the context of a cross-claim against a settling defendant, but also in its alternative context of a reduction in the amount of the plaintiff's claim proportionate to the settling defendant's putative liability ("claim reduction"). (See the Motion of Certain Respondents to Dismiss the Writ of Certiorari in *Westvaco*, cited above, p. 5.)

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[1] In contrast, *Wison P. Abraham* involves the more unusual procedure of an antitrust defendant bringing a third-party action against a party not sued by the plaintiffs.

Finally, unlike any of the other cases, this case raises the contribution issue in a context which most clearly demonstrates the potential abuse of a no-contribution rule: an attempt by some defendants to settle a class action *prior to Rule 23 certification* for "expense money" and to shift the entire risk of ultimate liability to the non-settling defendants. The absence of a clear rule allowing contribution or claim reduction thus enabled plaintiffs who had not yet established their right to sue as class representatives to coerce a premature settlement of class claims solely to obtain "financing" from some defendants, while preserving their entire claim (minus only the settlement amounts) against the remaining defendants.

This stratagem, feasible only if plaintiffs can offer early settlers freedom from contribution without themselves sacrificing any significant part of their claim, inevitably will encourage the filing of class actions by plaintiffs who would not be adequate class representatives under *Eisen*,[2] but for their ability to shift the financial burden to defendants even prior to class certification. This maneuver also brings into sharp focus the concern expressed by the CHIEF JUSTICE in *Deposit Guaranty National Bank v. Roper*, ... U.S. ....., 100 S.Ct. 1166, 1174 n.12 (March 19, 1980) (emphasis in original):

> Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach these questions.

The pre-certification settlement class issue, one of the thorniest in current class-action litigation and present

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[2] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

only in this case, is one which is inextricably intertwined with contribution and deserves to be resolved simultaneously.

In order to resolve the conflict in the circuits on the contribution issue and also to determine the propriety of the pre-certification settlement class device, thus removing the uncertainty plaguing much pending antitrust litigation, petitioners request that certiorari be granted immediately.

Respectfully submitted,

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IN THE

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Supreme Court of the United States

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
List of Authorities Cited	ii
Jurisdiction	2
Questions Presented	3
Statement of the Case	3
Spencer Foods Settlement	4
Flavorland Settlement	7
The Prior Involvement of the District Court	7
IBP's Motion to Amend	8
Reasons for Denying the Petition	8
I. Petitioners IBP and MBPXL Lack Standing to Appeal the Settlements	8
II. There Has Been No Appealable Order as to Petitioners IBP and MBPXL	9
A. The Spencer Foods Settlement	10
B. The Flavorland Settlement	10
III. Utilization of a Settlement Class to Accomplish Partial Settlement was in Conformance with Accepted and Usual Judicial Procedures	12
IV. Any Injury to IBP From the Denial of its Motion to Amend its Answer to Assert a Crossclaim for Contribution is too Speculative to Justify Supreme Court Review	16
V. No Conflict Exists Among the Circuit Courts on the Issue of Contribution Among Co-Defendants in Antitrust Actions	17
Conclusion	19
Certificate of Service	21

TABLE OF AUTHORITIES

Page

Cases:

Alabama v. Blue Bird Body Company, No. 75-23-N (M.D. Ala., June 22, 1979) 18

Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976) modified 73 F.R.D. 289 (N.D. Cal. 1976) 13

In re Ampicillan Antitrust Lit., 82 F.R.D. 652 (D.D.C. 1979) 9

Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1979) 2

In re Beef Industry Antitrust Litigation, M.D.L. No. 248 3

Boston Tow Boat Co. v. United States, 321 U.S. 632 (1944) 16

Bott v. American Hydrocarbon Corp., 441 F.2d 896 (5th Cir. 1971) 18

Brucker v. Thyssen-Bornemisza Europe, 424 F. Supp. 679 (S.D.N.Y. 1976) aff'd. 559 F. 2d 1202 (2nd Cir. 1977) 13

City of Detroit v. Grinnell, 495 F. 2d 448 (2nd Cir. 1974) 13, 14

Cobb v. Atych, 539 F.2d 297 (3rd Cir. 1976) cert. denied 429 U.S. 1103 (1977) 9

Cohen v. Beneficial Loan Corporation, 337 U.S. 541 (1949) 10

Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1972) 13

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) .. 11, 12

Page

Darrow v. Southdown, Inc., 547 F.2d 1333 (5th Cir. 1978) 10

Falciani v. Philadelphia Transp. Co., 189 F. Supp. 203 (D.C. Penn. 1960) 16

Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975) 13

Goldstein v. Andreson & Co., 465 F.2d 972 (5th Cir. 1972) 10

Greenfield v. Villager Indus., 483 F.2d 824 (3rd Cir. 1973) 13

Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975) cert. denied 423 U.S. 864 (1975) 13

Huggins v. Graves, 210 F. Supp. 98 (D.C. Tenn. 1962) 16

In re National Student Marketing Litigation, 68 F.R.D. 151 (D.D.C. 1974) 13

In re Nissan Motor Corp. Antitrust Lit., 552 F.2d 1088 (5th Cir. 1977) 9

Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967) 13

In re: Pittsburgh & Lake Erie R. Co., 543 F.2d 1058 (3rd Cir. 1976) 18

In re Plumbing Fixture Cases, 298 F. Supp. 484 (J.P.M.D.L. 1968) 13

Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979) 17, 18

Ryan v. United States, 379 U.S. 61 (1964) 2

Page

Seiffer v. Topsy's Int'l. Inc., 70 F.R.D. 662 (D. Kansas 1967) 9

Utility Contractors Ass'n. Inc. v. Toops, 507 F.2d 83 (3rd Cir. 1974) 9

Wainwright v. Kraftco Corp., 53 F.R.D. 78 (N.D. Ga. 1971) 9

West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970) aff'd. 440 F.2d 1079 (2 Cir. 1971) cert. denied, 404 U.S. 871 (1971) 13

Williamsburg Fair Housing Committee v. New York Housing Authority, 450 F. Supp. 602 (S.D.N.Y. 1978) 9

Statutes and Rules:

15 U.S.C. §1 4

15 U.S.C. §2 4

15 U.S.C. §15 4

Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess. 19

Federal Rules of Civil Procedure:

Rule 23 5

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JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The undersigned respondents respectfully request the Court to deny the petition for a writ of certiorari to review the judgment, entered on November 26, 1979, in the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

Respondents acknowledge the jurisdiction of this Court with respect to the appeal of Petitioners Farr Farms Company and Farr Feeders, Inc. ("Farr") from the order approving the Spencer Foods settlement and dismissing all claims against Spencer Foods. However, this Court is without jurisdiction to consider the following:

1. The issues raised by IBP and MBPXL relative to the Spencer Foods settlement (Appeal No. 78-3345). Petitioner MBPXL was not a party to that appeal. The appeal of Petitioner IBP was dismissed by the Fifth Circuit for lack of standing and lack of an appealable order. Neither of those petitioners seek review of those determinations in their Petition for Writ of Certiorari; and this Court should therefore decline to review the dismissal of that appeal. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Ryan v. United States*, 379 U.S. 61 (1964).

2. All issues relative to the Flavorland settlement (Appeal No. 79-1010). Petitioner Farr was not a party to that appeal. The Fifth Circuit dismissed the appeals of Petitioners IBP and MBPXL for lack of standing and lack of an appealable order. Neither of those petitioners seek review of those determinations in their Petition for Writ of Certiorari; and this Court should therefore decline to review the dismissal of that appeal. *Andrews v. Louisville & Nashville R.R., supra*; *Ryan v. United States, supra.*

3. All issues relative to the availability of contribution among antitrust action defendants (Appeal No. 78-3346). The issues are presented in this case only by virtue of the order denying the motion of IBP to amend its Answer, and that order is clearly not appealable.

QUESTIONS PRESENTED

1. Do non-settling defendants have standing to object to the partial settlement of antitrust damage actions?

2. Should this Court grant certiorari to review the holding of the Fifth Circuit that the Flavorland settlement order was not appealable where it merely conditionally approved the temporary settlement class and the proposed settlement, subject to final approval after hearing on notice to class members.

3. Should this Court grant certiorari to review the propriety of a negotiated partial settlement, in an action certified as a class action for settlement purposes, where the petitioner member of the plaintiff class: (a) has stated his opposition to the commencement and maintenance of the lawsuit; (b) is not seeking a larger settlement amount; and (c) has not expressed a willingness to represent the class?

4. Should this Court grant certiorari to review the affirmance of an order denying a motion to amend an answer to assert a crossclaim for contribution against a settling antitrust defendant where no Circuit Court has recognized an action for contribution against a settling co-defendant and where the motion to amend was filed solely as a tactic to prevent settlement?

STATEMENT OF THE CASE

The three cases before this Court are part of the consolidated proceedings of the "packer" and "retailer" cases in *In Re Beef Industry Antitrust Litigation, M.D.L. No. 248,* pending before the Honorable William M. Taylor, Jr. in the Northern District of Texas, Dallas Division. The plaintiffs in these cases are cattlefeeders. In the "retailer" aspect of the

litigation plaintiffs are suing large retail food chains, and here, in the "packer" aspect, plaintiffs are suing various beef packers. The three cases comprising the packer side are (1) *Meat Price Investigators Association, ("MPIA"), et al. v. Iowa Beef Processors, Inc. ("IBP") et al.*, (2) *Cameron, et al. v. IBP, et al.*, and (3) *Ludvigson, et al. v. IBP, et al.* In this latter case, four named plaintiffs seek to represent a nationwide class of sellers of "fat cattle." The three "packer" cases were filed in the Southern District of Iowa and were transferred by the Judicial Panel on Multidistrict Litigation for consolidated and coordinated pretrial proceedings with the previously filed "retailer" cases.

The Complaints in the three "packer" cases allege violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), and seek treble damages and injunctive relief (15 U.S.C. §§15 and 26). Virtually the same operative facts and violations are asserted against the defendants in the three cases. The defendants in each of these cases include four beef packers: IBP, MBPXL, Spencer Foods, and Flavorland. The packer-petitioners which opposed the settlements below are IBP, by far the largest beef packer in the United States, and MBPXL, another major beef packer. Respondents, the settling packers, are far smaller than either IBP or MBPXL.[1]

Spencer Foods Settlement

Settlement negotiations among plaintiffs and Spencer Foods commenced in February, 1978 and intensive negotiations were conducted on virtually a daily basis for three weeks. Judge Taylor was periodically advised of the potential settlement

[1] In 1977 Spencer lost over two million dollars; IBP had a net profit of thirty million dollars. Based upon net worth IBP was over 10 times larger than Spencer. (A-40) (All citations are to the appendix to the Petition herein.)

and the ongoing status of the negotiations. When an agreement was reached, the settlement documents were provided to the Court for its review. The Court made limited recommendations which resulted in certain modifications. By the terms of the ultimate settlement agreement, Spencer agreed to pay plaintiffs the sum of $425,000 and to make its records and employees available for discovery, in return for which plaintiffs agreed to dismiss all their claims against Spencer. The settlement was conditioned upon judicial approval following notice to the class and a hearing in accordance with Rule 23(e), Federal Rules of Civil Procedure. On May 25, 1978, the district court entered an order conditionally approving the temporary settlement class, conditionally approving the proposed settlement, directing the mailing of notice to the class, proposing the form and method of notice, and scheduling a hearing for August 11, 1978. (A-5). The notices, mailed to 54,804 persons on June 20, 1978, stated, *inter alia*, that the entire settlement fund might be used for litigation expenses and that class members had the option of opting out or of appearing by separate counsel at the August 11, 1978 hearing.

The August 11, 1978 hearing lasted a full day. The court heard live testimony from several witnesses, received a report from counsel for plaintiffs as to the dissemination of the notice and as to the small percentage of opt-outs,[2] took judicial notice of the discovery which had been taken on the class certification issue in the "retailer" phase of the litigation, and heard several hours of oral argument from all parties who wished to be heard (including counsel for objector Farr and for each of the non-settling defendants.) Of particular significance was the testimony of Spencer's executive vice president, who informed the court of Spencer's deteriorating fi-

[2] Fewer than two percent. (A-40)

nancial condition[3] which rendered it unable to make a larger settlement payment. He also testified that Land O'Lakes, a leading agriculture cooperative, had made a tender offer for all of Spencer's stock, contingent upon settlement of the antitrust litigation. The reopening of Spencer's principal slaughter facilities at Spencer, Iowa, under Land O'Lakes management was one of the many benefits plaintiffs would receive from the settlement, since the closing of that plant had left IBP the only beef purchaser available to many class members.

Although objections from three class members had been filed,[4] only William Farr (on behalf of Petitioners Farr) elected to present evidence in support of his "objections to the settlement." Farr, however, did not object to the merits of the settlement, was opposed to the litigation as being harmful to the cattle industry, and believed there was no factual basis for the lawsuit. (A58-59). Farr did not elect to "opt-out" of the class, nor did Farr offer to represent the class as an alternative to representation by the named plaintiffs.[5]

On August 21, 1978, Judge Taylor entered an order approving the Spencer settlement and certifying a class solely for purposes of that settlement. The Court specifically found that the settlement was "fair, adequate and reasonable, [not] collusive, and reflected a bona fide compromise of a genuine dispute bearing all normal perils of litigation as well as the additional uncertainties inherent in a complex class action." (A-20)

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[3] It had closed all but one of its seven operating facilities.

[4] Including one from Edward Rothe, who objected to the proposed settlement as a plaintiffs' class member while presenting arguments as counsel for the principal nonsettling defendant (IBP).

[5] On cross-examination, for example, W. D. Farr testified that he did not agree with the complaint in the packers case because he didn't believe there was any basis for it. In an affidavit filed several months prior to settlement, Farr stated: "I am opposed to these lawsuits. I believe they are harmful to cattlemen, they fail to deal with the problems of the cattle industry, and that there is no factual basis for the lawsuit." (A58-59)

Flavorland Settlement

In late 1978 Flavorland and plaintiffs negotiated a proposed settlement which was then submitted to the trial court for preliminary review. On December 31, 1978 the trial court issued its order conditionally determining a Flavorland temporary settlement class and tentatively approving a proposed Flavorland settlement which provided for the payment of $750,000 in exchange for the dismissal of all claims against Flavorland. (A23-27). At the time it issued this order, the district court had before it the full record of the Spencer settlement proceedings. It also had before it the record which IBP and MBPXL had made in the course of a week-long evidentiary hearing in early December, 1978, on the certification of a litigation class against the nonsettling defendants. The Fifth Circuit granted the motion of IBP to stay the mailing of notice of this tentative settlement, pending a hearing of the appeal of IBP and MBPXL. Consequently, no notice of the Flavorland settlement has yet been mailed to class members, no settlement hearing has been held, and the district court has not yet finally approved the proposed Flavorland settlement or the proposed Flavorland settlement class.

The Prior Involvement of the District Court

The district court had been extensively involved in various aspects of the Beef Industry Antitrust Litigation prior to its approval of the Spencer Foods settlement and its tentative approval of the proposed Flavorland settlement. Judge Taylor presided over one of the "retailer" cases, *Becker, et al. v. Safeway Stores, Inc., et al.*, which involved class allegations substantially identical to those asserted in the *Ludvigson* packer case. There had been substantial activity in the *Becker* litiga-

tion on the propriety of the plaintiff class, including extensive discovery, briefing and oral argument before Judge Taylor. Judge Taylor took judicial notice of the entire *Becker* record, including all discovery on the certification issue.

IBP's Motion To Amend Its Answer

On August 7, 1978, almost two years after commencement of the *MPIA* action and only four days prior to the hearing on the Spencer Foods settlement, defendant IBP moved for leave to amend its answer to assert a crossclaim against Spencer for contribution.[6] The trial court entered an order on September 1, 1978 denying IBP's motion to amend.

I. PETITIONERS IBP AND MBPXL LACK STANDING TO APPEAL THE SETTLEMENTS.

The appeals of IBP and MBPXL relative to the Spencer Foods and Flavorland settlements were dismissed by the Fifth Circuit on the ground, *inter alia*, that both IBP and MBPXL, as non-settling defendants, lacked standing to appeal.[7] This dismissal by the Fifth Circuit involved the routine application of established principles of law which does not warrant the discretionary review of the Supreme Court.

Few propositions would seem more basic than the one articulated by the district court and the Fifth Circuit herein:

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[6] Employing similar tactics, IBP moved on January 3, 1979—less than two weeks after entry of the order conditionally approving the Flavorland settlement—for leave to amend its answers to assert crossclaims for contribution against Flavorland. The district court has not yet ruled on this motion. IBP has not attempted to assert crossclaims against *any* non-settling defendant.

[7] The standing of MBPXL was considered only in connection with the Flavorland settlement. It had previously chosen not to appeal from the Spencer Foods settlement.

settlement agreements and proposed settlement agreements are the business of the parties to the agreements and to the reviewing courts alone and non-settling defendants have no legal right to challenge a settlement between the plaintiffs and one of several co-defendants. *See, e.g., Cobb v. Atych*, 539 F.2d 297, 300 (3rd Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *Utility Contractors Ass'n, Inc. v. Toops*, 507 F.2d 83, 85-86 (3d Cir. 1974) (observing that "[t]his small point of appellate procedure has not often been litigated, probably because it is so elementary"). Applying this principle, all the courts to consider the question, including the Fifth Circuit in this case (A41-44), have concluded that a non-settling defendant in a class action has no standing to object to a settlement between the plaintiff class and another defendant. *See, e.g., In re Nissan Motor Corp. Antitrust Lit.*, 552 F.2d 1088, 1103 n. 17 (5th Cir. 1977); *In re Ampicillan Antitrust Lit.*, 82 F.R.D. 652, 655-56 (D.D.C. 1979); *Williamsburg Fair Housing Committee v. New York City Housing Authority*, 450 F. Supp. 602, 607 (S.D.N.Y. 1978); *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622 (D. Kansas 1976); *Wainwright v. Kraftco Corp.*, 53 F.R.D. 78, 81 (N.D. Ga. 1971).

II. THERE HAS BEEN NO APPEALABLE ORDER AS TO PETITIONERS IBP AND MBPXL.

The August 21, 1978 order of the district court relating to the Spencer Foods settlement was not final, and therefore not appealable, with respect to petitioner IBP, the only co-defendant to appeal the order. The December 21, 1978 order of the district court relating to the Flavorland settlement was by its own terms only tentative and conditional, was not final with respect to any party, and therefore not appealable. The dismissal of these appeals by the Fifth Circuit represents no

more than a routine application of settled law relating to the final judgment rule of 28 U.S.C. §1291 and the collateral order doctrine of *Cohen v. Beneficial Loan Corporation,* 337 U.S. 541 (1949).

A. The Spencer Foods Settlement

As the Fifth Circuit correctly held, the order approving the Spencer Foods settlement does not end the litigation by fully determining the rights of IBP and is therefore not appealable by IBP as a final order (A43-44). *Darrow v. Southdown, Inc.,* 574 F.2d 1333 (5th Cir. 1978); *Goldstein v. Andreson & Co.,* 465 F.2d 972 (5th Cir. 1972).

B. The Flavorland Settlement

The argument that this Court is without jurisdiction to hear the appeals of IBP and MBPXL because of a lack of a final order applies with special emphasis to the challenge to the proposed Flavorland settlement. The order of the district court with respect to Flavorland did not, by its very terms, constitute a final disposition of the proposed settlement. On the contrary, it merely related to the initial step in the settlement and certification process—a mechanism for directing the mailing of notice of the proposed settlement to the members of the purported class and for scheduling a hearing "at which the settling parties could make a full record in support of the settlement and the absent class members could present any objections they might have." (A60) The conditional approval of both the temporary settlement class and the proposed Flavorland settlement were for this limited purpose and expressly made subject to reevaluation and final approval after full

hearing upon notice to the members of the purported class. (A23-27, A35-36) As the Fifth Circuit correctly observed:

> The settling parties have not reached first base. They are at the initial stage when the district court has conditionally approved a temporary settlement class subject to disapproval or redefinition at a later hearing. The settlement has not been approved and is subject to disapproval or modification at a larger hearing. (A60-61)

As the Fifth Circuit recognized (A61-63), a finding of non-appealability is largely mandated by the Court's recent decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), holding that an order refusing to certify an action as a class action is not appealable either under 28 U.S.C. §1291 or under the collateral order doctrine.[8]

Here, as in *Coopers & Lybrand*, the district court order is not appealable as a "final decision" under 28 U.S.C. §1291 because it would not "of its own force terminate the entire litigation." 437 U.S. at 467. The Flavorland order has in no way resolved the disputes between plaintiffs and the non-settling defendants and, because of its tentative and conditional nature, has not even disposed of the litigation between plaintiffs and Flavorland.

Nor is the Flavorland order appealable under the collateral order doctrine:

> An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Second, the class determination generally involves considerations that are

[8] Although *Coopers & Lybrand* involved an order refusing class certification, the Court's reasoning would appear equally germane to orders granting class certification. Indeed, in discussing the inappropriateness of permitting appeals from non-final orders, the Court observed that "the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." 437 U.S. at 476.

> 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case. 437 U.S. at 468-69. (citations and footnotes omitted).

These factors are particularly applicable to the Flavorland appeal since unlike *Coopers & Lybrand* the district court has not even had an opportunity to hold an evidentiary hearing to determine whether the formation of a permanent settlement class should be approved.

III. UTILIZATION OF A SETTLEMENT CLASS TO ACCOMPLISH PARTIAL SETTLEMENT WAS IN CONFORMANCE WITH ACCEPTED AND USUAL JUDICIAL PROCEDURES.

Petitioner Farr has standing to appeal with respect to the Spencer settlement. However, his professed views of the merits of the litigation and its impact on the settlement class make him an inappropriate party to invoke this Court's discretionary review. Farr is not a proper plaintiff to raise the issues posed by the Petition in that he does not question the amount of the settlement, does not want the settlement proceeds distributed to class members, and is opposed to the merits of the litigation itself. (A58-59). Farr is, to say the least, an unusual candidate to represent the interests of the absent class members in this Court, or in any other.

Certiorari should be denied because the procedures implemented to accomplish settlement here are sanctioned by the

authorities. The overwhelming weight of such authority recognizes that the certification of a class for settlement purposes only is an effective and just means of resolving complex legal disputes. Thus, in *City of Detroit v. Grinnell*, 495 F.2d 448 (2nd Cir. 1974), the court faced the issue of a partial settlement of an antitrust class action prior to certification of the class for litigation purposes. The trial court had approved the proposed settlement over the vigorous objections of several members of the settlement class. After carefully reviewing the settlement class mechanism, the Court of Appeals affirmed the decision of the trial court. Further support for the use of settlement classes is provided by *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) cert. denied 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed. 2d 93 (1975); *Greenfield v. Villager Indus.*, 483 F.2d 824 (3rd Cir. 1973); *Brucker v. Thyssen-Bornemisza Europe*, 424 F. Supp. 679 (S.D.N.Y. 1976), aff'd. 559 F.2d 1202 (2nd Cir. 1977); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269 (N.D.Cal. 1976), modified, 73 F.R.D. 289; *In re National Student Marketing Litigation*, 68 F.R.D. 151 (D.D.C. 1974); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972); *West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) aff'd. 440 F.2d 1079 (2nd Cir. 1971) cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 2d 115; and *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 488 (J.P.M.D.L. 1968).

Petitioners have cited little authority for their attack on the propriety of the settlements.[9] *The Manual for Complex*

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[9] The sole reported case cited by Petitioners on this issue, *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967) is clearly inapposite. In *Philadelphia Electric* the court was concerned with the lack of notice to the settlement class members. Such notice was, of course, given here prior to court approval.

Litigation, extensively cited by petitioners, is not controlling authority but by its own terms only a guide. The section of the *Manual* so heavily relied upon by plaintiffs is noteworthy not for the guidance it provides, but for the infrequency by which it has been followed. The recommendations of the *Manual* are clearly designed to preclude collusion, individual settlements and "buy-offs", where the plaintiffs' counsel simply utilizes the class action device to benefit his individual clients, often at the expense of absent class members. Both the district court and the Fifth Circuit were satisfied that none of these potential abuses was present here.[10] It is not concerned with situations such as the one presented here in which two defendants are seeking to settle for substantial sums and the class action continues against the remaining larger and wealthier defendants.

The highly factual nature of determinations relating to certification and/or settlement of class actions, and the great discretion afforded district courts in making these determinations, underscore the reasons why this Court should not grant review. In this case the terms of the Spencer settlement were subjected to a full evidentiary hearing and were thereafter found by the district court to be "fair, adequate and reasonable [and] not collusive" (A-20).

Accepting review of the settlement issues in this case would involve the Court in a plethora of factual and discretionary matters which are more appropriately left within the domain of the district court. As the Second Circuit observed in *City of Detroit v. Grinnell*, supra:

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[10] Similarly, the Court in *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974) also considered the admonitions of the *Manual* and rejected them as inapplicable to the facts of that case.

> . . . so much respect is accorded the opinion of the trial court in these matters that the Court will intervene in a judicially approved settlement of a class action only when objectors have made a clear showing that the District Court abused its discretion. 495 F.2d 448 at 455.

The Fifth Circuit was unpersuaded that Farr had made such a showing. Farr's Petition does not allege that the district court abused its discretion in approving the Spencer Foods settlement. On the contrary, the facts compel the conclusion that the district court, with full knowledge of the facts, acted fairly and reasonably.

The thrust of petitioners' challenge to the settlement class mechanism employed by the district court is its alleged prejudicial impact upon the court's consideration of litigation class certification issues. The alleged prejudice is not a matter which the non-settling defendants are entitled to raise in opposition to the Spencer settlement.[11]

First, the non-settling defendants' claims of prejudice are at this point purely speculative. The question of certification of a litigation class has been briefed and argued and is presently *sub judice* before the district court. Second, even if the district court decided issues involved in the litigation class question in ruling on the Spencer settlement, the non-settling defendants have not suffered a legally cognizable injury. Their position is no different from that of any litigant who finds that the court before which his case is pending has recently decided a factually or legally similar question in a man-

[11] Since the district court issued its order tentatively approving the proposed Flavorland settlement class after holding a week-long evidentiary hearing on the litigation class issue, the non-settling defendants' claims of prejudice apply only to the Spencer settlement.

ner adverse to him. See *Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944). Finally, if IBP and MBPXL believe the issue has been pre-judged by the district court, their proper procedural recourse is not to seek to overturn the Spencer settlement but rather to move to recuse Judge Taylor from ruling upon the litigation class issues.

IV. ANY INJURY TO IBP FROM THE DENIAL OF ITS MOTION TO AMEND ITS ANSWER TO ASSERT A CROSSCLAIM FOR CONTRIBUTION IS TOO SPECULATIVE TO JUSTIFY SUPREME COURT REVIEW.

IBP seeks review of the Fifth Circuit's refusal to permit amendment of its answer to assert a claim for contribution against Spencer. The order denying IBP's motion is not an adjudication of IBP's right to seek or obtain contribution from Spencer; but merely determines that the claim for contribution can not be prosecuted in the context of the instant litigation.

Even if the order were a "final decision" (see Section II, *supra*) review by this Court would be premature. The claim of IBP *pendente lite* is an inchoate claim only: any cause of action for contribution will accrue, and the statute of limitations begin to run, only at such time as IBP had paid more than its "fair share" of plaintiffs' damages. *Huggins v. Graves*, 210 F. Supp. 98 (D.C. Tenn. 1962); *Falciani v. Philadelphia Transp. Co.*, 189 F. Supp. 203 (D.C. Penn. 1960). IBP's interest at this point is too speculative and contingent to make this an appropriate case to invoke certiorari jurisdiction.

V. NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE ISSUE OF CONTRIBUTION AMONG CO-DEFENDANTS IN ANTITRUST ACTIONS.[12]

IBP asserts in its Petition that there is a conflict among the circuits with respect to the issue of whether contribution is available to antitrust defendants, citing *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), rehearing denied (April 17, 1979). There is no such conflict posed in the context of this appeal inasmuch as the holding in *Professional Beauty Supply* does not determine the question of whether a claim for contribution can be asserted against a *settling* co-defendant.

Professional Beauty Supply was an antitrust action commenced against a wholesaler of beauty supplies, National Beauty Supply, Inc., which, in turn, commenced a third-party action against a manufacturer. The trial court dismissed the third-party complaint with prejudice for failure to state a claim upon which relief could be granted, and the Eighth Circuit reversed. The Court of Appeals noted that dismissal was proper only if it was "beyond doubt" that National could not prove any set of facts which would entitle it to relief, and concluded that this burden had not been met. *Id.* at 1188.

It is important to note that defendant National Beauty Supply, Inc., sought to assert a claim for contribution against an alleged antitrust wrongdoer *who had not previously been made a party* to the litigation. This is in stark contrast to the situation presented here, where the claim was asserted against a co-defendant on the eve of settlement. The Eighth Circuit

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[12] Respondents adopt the Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit, *Westvaco Corp. et al. vs. Adams Extract Co. et al.* No. 79-972, to the extent that Brief addresses this issue.

specifically noted that it was not presented with the "problem of how to treat a joint tortfeasor who has settled in good faith". *Id.* at 1184. The court parenthetically addressed the issue of protecting settling defendants, and stated that the court "should be able to fashion [such] a rule of contribution", *id.*, citing authorities which would preclude contribution against settling defendants. On that basis, several courts have recently interpreted *Professional Beauty Supply* as prohibiting contribution against settling defendants. *Alabama v. Blue Bird Body Company*, No. 75-23-N (M.D.Ala., June 22, 1979), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); *In Re Fine Paper Antitrust Litigation*, MDL No. 323 (E.D.Pa. Aug. 3, 1979).

Petitioner IBP argues that *Professional Beauty Supply* governs the resolution of the contribution issue inasmuch as these lawsuits were initially filed in the District of Iowa (Eighth Circuit) and subsequently transferred to the Northern District of Texas. The rule, cited by IBP, that the law of the transferor forum governs the case arises in the context of conflicts among state law and does not require the application of the *federal* law of the transferor court subsequent to transfer. *In re: Pittsburgh & Lake Erie R. Co.*, 543 F.2d 1058 (3rd Cir. 1976). The logic of this distinction is particularly appropriate in transferred multidistrict litigation, where the transferee court, facing cases from a dozen or more jurisdictions, would need to make different determinations as to each of the transferred cases whenever a substantive issue arose. When these cases involve one class, such as here, resolution in favor of the law in one of the jurisdictions is obviously required. *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971).

The law concerning contribution among antitrust defendants is in an early stage of development. The Fifth Circuit is the only jurisdiction which has squarely faced this issue, and the issue presented is not ripe for review by this Court.[13]

CONCLUSION

The Petition for Writ of Certiorari does not raise any issues concerning the partial settlement of the class litigation that warrant review by this Court. Indeed, as the Fifth Circuit held, Petitioners IBP and MBPXL are not proper parties to challenge either the Spencer Foods settlement or the proposed Flavorland settlement for, under well-settled principles, these non-settling defendants lack standing. It is also clear that there has been no appealable order with respect to either IBP or MBPXL; the orders relating to the settlements did not end the litigation by fully determining rights of the non-settling defendants.

While the challenge of Petitioners Farr to the Spencer Foods settlement is properly before this Court, that settlement was accomplished in conformance with accepted and usual procedures. The procedures implemented by the district court and sanctioned by the Fifth Circuit do not raise any issues that require resolution by this Court.

Petitioner IBP seeks review of the denial of its motion to amend pleadings to assert a claim for contribution. Review of the issue of contribution among antitrust defendants is not appropriate in the context of this case, for the reasons, *inter alia*, that the order denying the motion of IBP is not appealable and there is no conflict among the circuits.

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[13] It should also be noted that the question of contribution among antitrust defendants is before Congress for its consideration. Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record for defendant-respondent Spencer Foods, Inc. hereby certifies that on March 6, 1980, three (3) copies of this Joint Brief in Opposition to Petition For Writ of Certiorari to United States Court of Appeals For The Fifth Circuit, filed this day on behalf of certain defendant-respondents and plaintiff-respondents in this matter, were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein and first class or air mail postage prepaid, in compliance with Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.

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Peter W. Sipkins

IN THE

MAR 19 1980

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1214

IOWA BEEF PROCESSORS, INC., et al.,
Petitioners,

vs.

MEAT PRICE INVESTIGATORS ASS'N.,
DARRELL CAMERON, and DON LUDVIGSON, et al.,
Respondents.

SUPPLEMENT TO JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF AUTHORITIES

	Page
Cases:	
Cooper v. American Employers' Insurance Co., 296 F.2d 303 (6th Cir. 1961)	4, 5
Foman v. Davis, 371 U.S. 178, 182, 183 (1962)	4
Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 330-401 (1971)	4, 5
Rules:	
Federal Rules of Civil Procedure 8(a)	3
Federal Rules of Civil Procedure Rule 15(a)	4
Secondary Authorities:	
3 J. Moore, *Moore's Federal Practice* ¶15.08 [4] (2d ed., 1979)	5
C. Wright and A. Miller, *Federal Practice and Procedure* §1487-88 (1971)	5

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This Supplemental Brief to the Joint Brief in opposition to the Petition for Writ, raises two matters inadvertently omitted from or not adequately explained in the joint brief, but of great importance to the Plaintiff-Respondents in the three cases.

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING IBP'S LEAVE TO AMEND TO ASSERT A CROSS-CLAIM FOR CONTRIBUTION AGAINST SPENCER FOODS.

Over two years after *Meat Price Investigators Ass'n v. Iowa Beef Processors, Inc., et al.*, was filed, and two months after it learned of Spencer's intent to settle with the Plaintiffs, IBP filed its Motion to Amend to assert a 1-paragraph purported cross-claim for contribution against Spencer. By this time, notice had been sent to the 54,804 absent class members, and the hearing on final approval of the settlement was only four days away. Although it had previously been IBP's position that there were 1,665 federally inspected cattle slaughterers who were indispensable parties to one of the suits (5th Cir. Supp. APP. page 842), IBP chose to assert its contribution cross-claim against only the settling defendant, Spencer Foods. IBP gave no reason, in its Motion, why Spencer Foods might be liable for contribution, whereas, apparently no other named or unnamed packer defendant would be.

Prior to the ruling disallowing the amendment, the following exchange took place at the August 11, 1978 settlement hearing before the Trial Court (Mr. Hawkins is attorney for the Plaintiff; Mr. Heubaum is General Counsel for IBP):

> "Mr. Hawkins: What facts did you have to make that statement on contribution? What facts did you have that Spencer was involved in any way with you so that you could file a contribution action against them? What facts in your knowledge at the time you made the statement did you have?

Mr. Heubaum: Are you addressing yourself to the facts which would constitute a violation of the antitrust laws of the nature alleged in the Complaint?

Mr. Hawkins: That's right.

Mr. Heubaum: None whatsoever."

(August 11, 1978, Tr. P. 63). IBP is asking this Court to rule that it should be allowed to interject a cross-claim in the complicated proceedings below, despite the fact IBP has told the Trial Court it has no facts to support such a claim. On this basis alone, this Court should deny the right to review the denial of the contribution amendment. There is no case or controversy between the parties.

IBP's purported cross-claim against Spencer Foods is one paragraph:

"Iowa Beef Processors, Inc., while denying any liability to Plaintiffs in the above cases, hereby asserts a claim of contribution against its co-defendant, Spencer Foods, Inc., as and to the extent that IBP should ultimately be required to pay to any of the Plaintiffs an amount which is more than its proportionate share of any liability asserted against the defendants, jointly and severally."

Even if there were such a thing as having a claim for contribution under the Sherman Act, this pleading does not comply with even the simple requirements of *Federal Rule of Civil Procedure* 8(a). It does not state why Spencer would be liable to the Plaintiffs, it does not state to the Court what share of the damages would be Spencer's share; and it does not even speak in terms of ultimate judgment against IBP. Rather, it talks in terms of "liability asserted against the defendant." One might wonder why IBP is attempting to assert

a right of contribution only against Spencer Foods at this time. The answer is simple. IBP wants to block the settlement between the Plaintiffs and Spencer Foods. In the hearing before the Trial Court on August 11, 1978, it was disclosed that General Counsel for IBP, Mr. Heubaum, had called General Counsel for Spencer Foods, C. William Eastwood, as soon as IBP learned of the settlement. Mr. Heubaum told Mr. Eastwood that IBP would do everything it could to keep Spencer in the litigation. (August 11, Tr. pp. 61-62, 75).

The allowance or disallowance of an amendment to a Complaint under Rule 15(a) *Fed. R. Civ. P.*, is a matter within the Trial Court's sound discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). If there is an apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment, futility of amendment, etc.—the Trial Court is within its discretion to deny the amendment. *Foman v. Davis*, 371 U.S. at 183.[1] Here, the amendment was asserted only to block the settlement, to the prejudice of Spencer (which desired to settle and end its involvement in the litigation), the Plaintiffs (who have expended money on the temporary class notice and who desire to simplify the lawsuit) and Land-O-Lakes (a farmers' cooperative which has purchased Spencers assets relying on the settlement). Prejudice to third parties may be considered in denying leave to amend. *Cooper v. American Employers' In-*

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[1] The Order Denying Motion of Defendant Iowa Beef Processors, Inc. To Amend Answer To Assert Crossclaim, dated September 1, 1978 is based in part on Defendant's conduct as is reflected by the Court's inclusion of the phrase ". . . and upon all the files, records and proceedings herein. . . ".

surance Co., 296 F.2d 303 (6th Cir. 1961). Considering IBP's delay in making the motion to amend, its admitted lack of factual basis for the contribution claim, and the prejudice to all other parties, the Trial Court was well within its discretion in denying leave to amend. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-401 (1971). *See, Generally* 3 J. Moore, *Moore's Federal Practice* ¶15.08 [4] (2d ed., 1979) C. Wright and A. Miller, *Federal Practice and Procedure* §1487-88 (1971).

II. RECUSAL IS NOT WARRANTED.

In the joint brief in oppositon, at page 16, there is a statement which might suggest that Plaintiffs believe Judge Taylor should recuse himself from ruling on the pending class determination motion. Plaintiffs disavow the suggestion that any recusal is appropriate. There is no reasonable basis for such a motion for recusal because the non-settling defendants have not been prejudiced on the merits of the Class Action Motion by the Spencer settlement proceedings. Judge Taylor has stated that the creation of a temporary settlement class does not have any bearing on his determination of the propriety of a litigation class (A6-7, 24-25). After the Spencer settlement was final, the non-settling defendants presented five full days of evidence on the class action issue before Judge Taylor, and the matter is fully briefed and under submission to Judge Taylor. At no time have defendants ever moved to

recuse Judge Taylor on grounds of prejudice as the result of the Spencer settlement proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1214

Iowa Beef Processors, Inc., et al.,

Petitioners,

vs.

Meat Price Investigators Ass'n, Darrell Cameron, and Don Ludvigson, et al.,

Respondents.

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

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March 20, 1980

TABLE OF CONTENTS

PAGE

I.

This Court Has Certiorari Jurisdiction 1

A. The Jurisdictional Questions Are Fairly Comprised in the Substantive Questions 2

B. IBP and MBPXL Have Standing as Prejudiced Parties 3

C. The Settlement Class Orders Are Appealable .. 4

D. The No-Contribution Order Is Appealable 6

II.

The Settlement Class Device Demands This Court's Scrutiny 8

A. Partial Settlement Classes Are Not Accepted and Usual 8

B. Settlement Classes Are Too Dangerous To Be Left to Discretion 10

C. Farr Challenged All Aspects of the Spencer Settlement 13

D. IBP and MBPXL Were Prejudiced 14

III.

There Are Conflicts On The Antitrust Contribution And Choice Of Law Issues 15

A. The Contribution Conflict 15

B. The Choice of Law Conflict 17

Conclusion 18

Addendum Reply to Plaintiffs' Supplement

I.

Denial Of Leave To Cross-Claim For Contribution Was Not A Discretionary Ruling 20

II.

Recusal Is Neither Adequate Nor Tenable 24

LIST OF AUTHORITIES CITED

Cases

Abraham Construction Co. v. Texas Industries, Inc., 604 F.2d 897 (5th Cir.), rehearing denied, 608 F.2d 524 (5th Cir. 1979), cert. petn. pending, No. 79-1144 .. 16
Ampicillin Antitrust Lit., In re, 82 F.R.D. 652 (D.D.C. 1979) 9
Altman v. Liberty Equities Corp., 54 F.R.D. 620 (S.D.N.Y. 1972) 23
Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972) 2
Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe, 434 F.Supp. 920 (E.D. La. 1977) 8
Bell v. Hood, 327 U.S. 678 (1946) 4
Berry Petroleum Co. v. Adams & Peck, 518 F.2d 402 (2nd Cir. 1975) 17
Bott v. American Hydrocarbon Corp., 441 F.2d 896 (5th Cir. 1971) 17
Cessna Distributorship Antitrust Litigation, In re, 532 F.2d 64 (8th Cir. 1976) 7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 4, 5, 6
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 5, 6
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 5, 6, 12
General Motors Corp. Engine Interchange Litigation, In re, 594 F.2d 1106 (7th Cir. 1979), cert. denied, 100 S.Ct. 146 (1979) 5, 6
Impervious Paint Industries, Inc. v. Ashland Oil Co., Nos. C78-0068 & 69L(A) (W.D. Ky., 8/2/78 unreported) 10
Little Rock School District v. Borden, Inc., 1980-1 Tr. Cas. ¶ 63,059 (E.D. Ark. 1979) 15
Martello v. Hawley, 300 F.2d 721 (D.C. Cir. 1962) 23
Olson Farms, Inc. v. Safeway Stores, Inc., 1979-2 Tr. Cas. ¶ 62,995 (10th Cir. 1979), rehearing en banc granted (Dec. 27, 1979) 16
Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967) 9

Pittsburgh & Lake Erie R. Co., In re, 543 F.2d 1058 (3rd Cir. 1976) 17
Plumbing Fixtures Litigation, In re, 342 F.Supp. 756 (JPML 1972) 17
Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979), rehearing en banc denied (4/17/79) 15
Rakas v. Illinois, 439 U.S. 128 (1978) 3
Ryan v. United States, 379 U.S. 61 (1964) 2
Seatrain Shipbuilding Corp. v. Shell Oil Co., 48 U.S.L.W. 4149 (Feb. 20, 1980) 4
Singleton v. Wulff, 428 U.S. 106 (1976) 3
Westvaco Corp. v. Adams Extract Co., 10/30/79 (5th Cir. unreported), cert. petn. pending No. 79-972 16

Statutes and Rules

28 U.S.C. § 1291 4
28 U.S.C. § 1407(a) 17

Federal Rules of Civil Procedure:
Rule 12(b)(6) 7
13(g) 7, 15, 21
14(a) 15
18(b) 7
23 ..... *passim*
42(b) 17
54(b) 4, 6

Supreme Court Rules:
Rule 19-1(b) 10
23-1(c) 2
24-2 2
24-4 2

Miscellaneous

Manual for Complex Litigation § 1.46 ..... 11, 12
1B Moore's Federal Practice ¶ 0.409[1] 7
3 Moore's Federal Practice ¶15.08[4] 7
9 Moore's Federal Practice ¶ 110.09 4
Wright & Miller, Federal Practice and Procedure: Civil § 2654 4

In The

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Iowa Beef Processors, Inc., et al.,

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Respondents.

PETITIONERS' REPLY IN SUPPORT OF CERTIORARI

I.

THIS COURT HAS CERTIORARI JURISDICTION.

The petition for certiorari, filed jointly by IBP, MBPXL, and Farr, presents for review important and timely issues of antitrust multidistrict class action litigation: whether Rule 23 permits the settlement of class claims prior to class certification, particularly when only some defendants have settled and the class certification issue remains contested; and whether a non-settling defendant has contribution rights as a matter of federal antitrust law, particularly when it would have such rights under the law of the transferor forum.

Respondents seek to obscure these substantive issues and discourage review by raising illusory jurisdictional issues of standing and appealability.

A. The Jurisdictional Questions Are Fairly Comprised in the Substantive Questions.

Respondents first argue that IBP and MBPXL have waived their right to challenge the Fifth Circuit's approval of the settlement class device because they did not specifically seek review of the lower court's holdings that non-settling defendants have no standing at all to complain about any aspect of a settlement, and, in any event, an order approving a class settlement is non-appealable. (Opp. Br. 2.) But the standing and appealability issues are necessarily "fairly comprised" within the substantive questions presented in the petition, as contemplated by Supreme Court Rule 23-1(c); they were discussed in the body of the petition (pp. 7, 15 n.4); they have been presented by respondents as objections to the jurisdiction of this Court, as contemplated by Supreme Court Rule 24-2; and they will be addressed in this reply, as contemplated by Supreme Court Rule 24-4. This is certainly not a case where new substantive issues, not raised during the briefing on the petition, are sought to be injected after certiorari has been granted, as in the *Andrews* and *Ryan* cases relied on by respondents (Opp. Br. 2). Moreover, even if it could be said that IBP and MBPXL somehow intended to waive their right to seek certiorari on the substantive issues because they did not specifically enumerate the jurisdictional issues in the "Questions Presented", the substantive questions presented for review in the petition are undeniably before the Court since Farr's standing and right to appeal the Spencer settlement are conceded.

B. IBP And MBPXL Have Standing as Prejudiced Parties.

Both the Fifth Circuit and respondents rely on the cliché that non-settling defendants have no standing to object to the merits of a settlement to which they are not parties because they are not prejudiced and it is none of their business. (Pet. A-4; Opp. Br. 9.) This is a meaningless tautology, for here IBP and MBPXL challenge not the fairness and adequacy of the settlement (which is the province of petitioner Farr, a class member whose standing is unquestioned), but the use of the settlement class device to achieve the settlement. IBP and MBPXL's vigorous opposition to class certification has clearly been prejudiced by the District Court's factual findings and legal conclusions, based solely on a stipulation between the settling parties and without following the normal adversary procedures for developing evidence and arguments, that a Rule 23 class exists.[1]

This Court has held that "standing" requires only that "the proponent of a legal right has alleged 'injury in fact'" and is asserting his own legal rights and interests (and not those of third parties). *Rakas v. Illinois*, 439 U.S. 128, 139 (1978); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). Thus, whether IBP and MBPXL have standing depends on whether they were prejudiced in their continuing opposition to the class certification motion by

[1] It is precisely this type of prejudice that convinced this Court to outlaw the mini-hearing-on-the-merits device in *Eisen*. And it is small consolation that, as respondents suggest (Opp. Br. 16), IBP and MBPXL are faced with the Hobson's choice of either having the litigation class certification issue decided by a Judge who has already found that the Rule 23 class prerequisites have been satisfied or moving to recuse the Judge who is responsible for supervising the entire course of the litigation. Neither the Judge nor the petitioners should be placed in that position by a procedure which has no foundation in law.

use of the settlement class procedure; and whether they were prejudiced depends on whether—and under what circumstances—classes for settlement purposes are permissible under Rule 23, which is the substantive issue presented for review. Denial of review for lack of standing would necessarily decide the substantive issue, and this Court long ago condemned the masking of merits decisions through jurisdictional rulings. *Bell v. Hood*, 327 U.S. 678, 681-682 (1946).

C. The Settlement Class Orders Are Appealable.

Respondents completely ignore that the District Court's final order establishing a permanent settlement class, approving the Spencer settlement, and dismissing Spencer as a party to the case was expressly made final pursuant to Federal Civil Rule 54(b) (Pet. A-20) and, as such, was appealable as a "final decision" under 28 U.S.C. § 1291. See *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 48 U.S.L.W. 4149, 4152 (S.Ct., Feb. 20, 1980). Indeed, IBP had to take an appeal immediately or waive its claim that the order violated Rule 23. See Wright & Miller, Federal Practice and Procedure: Civil § 2654, at 34; 9 Moore's Federal Practice ¶ 110.09.

In addition, the Spencer permanent settlement class determination, as well as the Flavorland tentative settlement class order, was also appealable under the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Respondents' argument that those orders are not appealable because they do not finally terminate the entire litigation (Opp. Br. 10-11) ignores the teaching of *Cohen* and its progeny that there is a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546.

The Spencer and Flavorland orders meet *Cohen*'s requirements because they both approved of the use of the settlement class device, prior to certification, to process partial settlements. IBP and MBPXL challenge the propriety of the use of the settlement class device under these circumstances—an issue which the Fifth Circuit itself characterized as "[o]ne of the most controversial issues in the management of complex class action litigation." (Pet. A-44.) It is also an issue which could not effectively be reviewed at the end of the litigation because the settlements would be final, the settling defendants would have been dismissed from the litigation, and the claimed prejudice to non-settling defendants would be incurable.

In this respect, this situation is quite unlike the discretionary grant or denial of class certification for litigation purposes which can be effectively reviewed as part of a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). Rather, this case falls within the ambit of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974), where this Court applied *Cohen* to permit review of a district court's order imposing 90% of the cost of class notice on the defendants because the issue was collateral and unrelated to the merits of the litigation and the defendants' objection to the procedure had been conclusively rejected. Similarly, it has been expressly held that an order approving a class settlement is appealable under *Cohen* where it raises issues concerning the conduct of negotiations, the procedures followed at the settlement hearing, and the power of the District Court to approve the settlement of class actions. *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1119-1121 (7th Cir.), *cert. denied*, 100 S.Ct. 146 (1979).

As in *General Motors*, Judge Taylor's order finally determining the Spencer settlement class "is not tentative; it is capable of review without extensive examination of the merits; it raises issues which could not be effectively reviewed later; and it presents important, unresolved legal questions for consideration by this Court." *Id.*, at 1121. And although the order determining a tentative settlement class for purposes of the Flavorland settlement was subject to a hearing on the settlement, the procedure to be used had been established in the handling of the Spencer settlement and there was nothing tentative at all about the District Court's determination that Rule 23 permitted him to use the settlement class device, which is the issue appealed by IBP and MBPXL. That issue is comparable to the District Court's decision in *Eisen* that Rule 23 permitted a mini-hearing and the imposition of notice costs on defendants.

The Spencer and Flavorland settlement class orders "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand, supra*, 437 U.S. at 468 (footnote omitted). Nothing more is required to make them appealable under *Cohen*. Moreover, since Farr has an undisputed right to appeal the Spencer order and IBP has that right under Rule 54(b), the settlement class issue is properly before this Court regardless of any doubts about the applicability of *Cohen*.

D. The No-Contribution Order Is Appealable.

Respondents argue that Judge Taylor's order refusing to allow IBP to amend its answer to assert a cross-claim for contribution against Spencer is not a final,

appealable order because it was not "an adjudication of IBP's right to seek or obtain contribution from Spencer; but merely determines that the claim for contribution cannot be prosecuted in the context of the instant litigation." (Opp. Br. 16.) This is patently false.

Judge Taylor expressly denied leave to amend because "no right of contribution exists under the federal antitrust laws". (Pet. A-22.) A refusal to allow a cross-claim because of legal insufficiency is the same as a dismissal for failure to state a claim upon which relief may be granted under Federal Civil Rule 12(b)(6), which has *res judicata* effect. 3 Moore's Federal Practice ¶15.08[4] at 15-110; 1B Moore's Federal Practice ¶0.409[1] at 1005. Thus, Judge Taylor's denial of leave to amend was as final an order as any Rule 12(b)(6) dismissal, and IBP would have lost its claim if it had failed to appeal. Furthermore, it has been expressly held that an order denying leave to amend to assert a cross-claim for antitrust contribution is appealable, *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64 (8th Cir. 1976), and the Fifth Circuit ruled on the merits of this issue without questioning appealability, although respondents had argued the point. (Pet. A-63-64.)

Respondents also assert that since IBP's right to contribution would mature only if and when it is forced to pay more than its fair share of a judgment, IBP's interest in contribution is "too speculative and contingent to make this an appropriate case to invoke certiorari jurisdiction." (Opp. Br. 16.) But Federal Civil Rule 13(g) expressly permits a cross-claim against a co-party who "may be liable" for all or part of the main claim and Rule 18(b) expressly permits the joinder of a claim which is contingent upon the outcome of the main claim. Thus, IBP clearly had a right to seek leave to amend its

answer to assert a contribution cross-claim.[2] Having done so, IBP was entitled to appeal the District Court's adverse ruling that contribution is unavailable as a matter of law and there is nothing so speculative and contingent about the substantive availability of contribution that certiorari is inappropriate to resolve the issue.

If the issues raised in the petition are important enough to command this Court's attention, the mumbo jumbo of standing and appealability should not stand in the way.

II.
THE SETTLEMENT CLASS DEVICE DEMANDS THIS COURT'S SCRUTINY.

A. Partial Settlement Classes Are Not Accepted and Usual.

Respondents argue that the use of the settlement class device to accomplish a partial settlement, prior to class certification, is but a discretionary application of

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[2] Indeed, failure to assert contribution at the earliest possible time might result in loss of that right:

> Under some circumstances, it may be unreasonable for one who claims contribution or indemnity to wait until liability is fixed before asserting his third-party claim. Hence, laches may indeed run before liability is conclusively determined. [*Avondale Shipyards, Inc. v. Vessel Thomas E. Cuffe*, 434 F.Supp. 920, 934 (E.D. La. 1977).]

Moreover, one of the cogent arguments favoring contribution in antitrust cases is that an adversary position among defendants during discovery and trial will lead to the fullest exposition of the relevant facts and this, as well as judicial expediency, argues for the assertion of contribution by way of a cross-claim in the main litigation rather than in a subsequently-filed contribution action where essentially the same facts would have to be retried. This is why IBP filed its motion to amend shortly before the August 11 hearing—not, as respondents charge (Opp. Br. 8), to obstruct settlement. IBP has consistently proposed an approach to contribution that permits settling defendants to be dismissed but without prejudice to non-settling defendants. (See Pet. 18.)

"accepted and usual judicial procedures". (Opp. Br. 12-14.) Nothing could be further from the truth.

As the Fifth Circuit itself conceded (App. A-44), this is one of the "most controversial issues in the management of complex class-action litigation." Juxtaposed are, on the one hand, the collective judicial wisdom embodied in the Manual for Complex Litigation which has, since its inception, flatly stated that under no circumstances should settlement classes be formed, the lack of any provision for settlement classes in Rule 23, and Professor Miller arguing against settlement classes; and on the other hand, a number of cases (Opp. Br. 13) where the Manual was honored in the breach in order to facilitate settlements. None of those cases, however, until this and the recent *Ampicillin*[3] decision, sanctioned the use of the settlement class device where it did not dispose of the entire litigation and left contested class certification issues to be decided.

To the contrary, the earliest decision to grapple with the issue held that a proposed pre-certification partial settlement should be held in abeyance until the class certification question was determined. *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324, 328 (E.D. Pa. 1967).[4] As far as we know, this

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[3] *In re Ampicillin Antitrust Lit.*, 82 F.R.D. 652 (D.D.C. 1979).

[4] Respondents hope to belittle the importance of this seminal decision by arguing that the Court was concerned only with lack of notice to the class. (Opp. Br. 13, n.9.) But the Court's decision was far broader: Judge Fullam was indeed concerned that, without going through the certification procedure, the Court would not have sufficient information to provide adequate notice to the class, but he was also concerned that "the parties should not be allowed to compromise [the class certification] issue in advance of the court's determination" and that "no litigant should be permitted to enhance his own bargaining power by merely alleging that he is acting for a class of litigants." (42 F.R.D. at 328.)

approach was followed in the ensuing ten years, as, for example, in *Impervious Paint Industries, Inc. v. Ashland Oil Co.*, Nos. C78-0068 & 69L(A) (W.D. Ky., 8/2/78, unreported.)

Thus, whatever might be said for not reviewing the settlement class device because a number of lower courts have ignored the Manual cannot be said for the even more objectionable practice of using it to achieve only a partial settlement, which certainly has not been "an accepted and usual" procedure. Indeed, the Fifth Circuit's sanctioning of the District Court's rubber-stamp certification of a class for partial settlement purposes is such a departure from the accepted and usual course of judicial proceedings that the exercise of this Court's certiorari power of supervision is called for under Supreme Court Rule 19-1(b). This is in addition to the fact that the growing use of settlement classes is obviously an important question of federal class action procedure which has not been, but should be, settled by this Court.

B. Settlement Classes Are Too Dangerous To Be Left To Discretion.

Respondents further attempt to denigrate the importance of the settlement class issue by arguing that the use of settlement classes turns on discretionary fact issues which, in this case, were resolved by the District Court after a full evidentiary hearing. (Opp. Br. 14-15.) But the record shows that there was no such careful consideration of either the merits of the settlement or the propriety of the settlement class.

The District Court's May 25, 1978 order "conditionally" determining the temporary settlement class and approving the Spencer settlement was a stipulated order entered during a 5-minute *ex parte* hearing with

absolutely no supporting evidentiary record, as the Manual says (§ 1.46) there should be.[5] (Pet. A-1-9.)

The August 21, 1978 order finally approving the Spencer settlement as "fair, adequate and reasonable" and non-collusive is expressly stated to be "[b]ased on consideration of the benefits to be afforded to members of the Settlement Class as set forth in the Covenant Not to Sue and Settlement Agreement" which, in fact, recites no benefits other than Spencer's payment of $425,000 and making its witnesses and documents available. (Pet. A-20.) This is because there was not even an attempt, at the August 11 evidentiary hearing, to justify the economic merits of the settlement[6] other than to have Spencer's executive vice president testify that $425,000 was all Spencer could afford to pay.[7] The hearing did last for most of the day, as respondents state (Opp. Br. 5), but was consumed mostly with argument, not with evidence that would justify a conclusion that the District Court did anything more than rubber-stamp the settlement. Nor was there any attempt to prove up

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[5] The Manual (§ 1.46) also encourages the district judge to hear from non-settling parties.

[6] Proof of probable liability and damages was particularly necessary here because there had been no prior Government proceedings involving these defendants.

[7] Spencer's executive vice president testified that Spencer had sustained a $2 million loss in fiscal 1977 and had discontinued 5 unprofitable plants. (Only 1 of those was a beef slaughtering plant and there was absolutely no evidence to support respondents' statement (Opp. Br. 6) that the closing of that plant had left IBP as the only cattle purchaser available to many class members.) But on September 3, 1978—just 3 weeks after the August 11 hearing—Spencer released its earnings report for the *9 months* ended *July 29, 1978*, showing a profit of $1,379,000 from the continuing operation of but one beef plant. This dramatic turnaround in Spencer's fortunes was obviously known—but not disclosed to the Court—at the hearing.

the elements of a Rule 23 class except to ask the Court to take blanket judicial notice of the discovery record in the supermarket class action to which the packers were not parties and which never culminated in a class action determination.

Respondents also argue that the Manual is concerned only with collusive settlements which benefit individual plaintiffs at the expense of the class they purport to represent and that this did not happen here because there were substantial settlements with two smaller defendants, leaving two larger defendants in the case. (Opp. Br. 14.) But there are all types of collusion and the Manual (§ 1.46) was as much concerned with giving uncertified class attorneys unfair leverage over smaller defendants as with giving large defendants a chance to settle class liabilities for peanuts. The overriding concern, also expressed by this Court in *Eisen*, is that the whole delicate fabric of the class action procedure would be destroyed "by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it." 417 U.S. at 177. Thus, while here smaller defendants negotiated pre-certification class settlements (for amounts which were surely *de minimus* in light of the billions of damages claimed), if the procedure is allowed to go unchallenged there is nothing to prevent large defendants from settling for enough to finance litigation expenses, leaving smaller defendants holding the bag. And how can any procedure be justified simply because smaller defendants (who may indeed be more culpable than larger defendants) are able to take advantage of it? The settlement class device is too pernicious to be left to discretionary application—particularly, as in this case, where no record-supported discretion was in fact applied.

C. Farr Challenged All Aspects of the Spencer Settlement.

Respondents are quite wrong in asserting (as did the Fifth Circuit) that Farr did not challenge the merits of the settlement. (Opp. Br. 12.) In his written opposition to the Spencer settlement, Farr specifically challenged the failure of the settling parties to allocate the lump-sum settlement between the individual plaintiffs' suits and the class action and the lack of evidence that the class settlement amount was fair and reasonable. He also objected to the settlement class device and to the proposed use of class funds to reimburse non-class plaintiffs (represented by the same attorneys as the class representatives) and to finance further class litigation which he felt was not only baseless, but in fact detrimental to the best interests of the nation's cattle feeders. His credentials, as an important pioneer cattle feeder and a founder, past president, and director of the National Cattlemen's Association, are impeccable and lend great credibility to his objections, and there is no rule that a class member can object only to the inadequacy of the settlement amount and must offer to substitute himself as the class representative, as respondents suggest.[8] (Opp. Br. 6, 12.)

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[8] The notice to the class, prepared by the settling parties and approved, *ex parte*, by the District Court, discouraged any meaningful response from class members by predicting that the entire proceeds of the settlement would be awarded to the plaintiffs for past and future expenses and there would be nothing for any class member. (Pet. A-14.) Moreover, the settlement fund was only $425,000—less than $10 per class member notified—and offered no incentive to intervene. Since neither opting out nor intervention would be worthwhile, the settling parties were virtually assured of no significant opposition. Under these circumstances, only an elder statesman in the cattle industry, like Farr, could be expected to appear.

D. IPB and MBPXL Were Prejudiced.

Finally, respondents argue that IBP and MBPXL have suffered no legally cognizable prejudice with respect to the litigation class certification issues because the District Court's determination of the settlement class places them in the same position as "that of any litigant who finds that the court before which his case is pending has recently decided a factually or legally similar question in a manner adverse to him." (Opp. Br. 15-16.) This argument is wholly specious because there are not, here, two completely distinct pieces of litigation with different parties, but instead a single case in which IBP and MBPXL are both defendants. The great injustice, quite different from the routine operation of *stare decisis*, is that IBP and MBPXL were denied even standing to object to the settlement class procedure, but then found the District Court's settlement class findings of fact and conclusions of law used against them on the litigation class question. The perversity of this entire procedure is best shown by plaintiffs' counsel's opening statement to the District Court at the December 12, 1978 class action evidentiary hearing, taking the position that all of the class action issues involved in the settlement class determination should be considered *res judicata*.

The settlement class device needs desperately to be reviewed by this Court before it becomes an unbridled vehicle for coercive and collusive settlements, completely undermining orderly class action procedures.

III.

THERE ARE CONFLICTS ON THE ANTITRUST CONTRIBUTION AND CHOICE OF LAW ISSUES.

A. The Contribution Conflict.

Respondents argue that there is no real conflict in the Circuits on the contribution rights of antitrust co-defendants because this case involves a Rule 13(g) cross-claim for contribution against a settling co-defendant, whereas the Eighth Circuit's decision in *Professional Beauty Supply* involved a Rule 14(a) third-party complaint. (Opp. Br. 17.) Just why this makes a difference is unexplained, since both rules embody the same language permitting a defendant to assert a claim against someone who "may be liable" to him "for all or part of" the plaintiff's claim. The procedural setting in which the contribution issue is raised is completely irrelevant to the fundamental question whether contribution is available at all.

In *Professional Beauty Supply*, the Eighth Circuit said (594 F.2d at 1186):

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tortfeasors in an antitrust action.[9]

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[9] In the discussion preceding this conclusion, the Eighth Circuit did note that "[t]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case"—not, as respondents suggest (Opp. Br. 18), to imply that contribution might not apply in such a case, but rather to affirm that allowing contribution need not "undermine the judicial policy in favor of settlement" because it should be possible to "fashion a rule of contribution which will protect the rights of settling defendants" in such a case. (594 F.2d at 1184.) And that is exactly what a district court in the Eighth Circuit has now done to implement the Eighth Circuit's contribution rule in a procedural context (a cross-claim against a settling defendant) identical to that presented here. *Little Rock School District v. Borden, Inc.*, 1980-1 Tr. Cas. ¶63,059 (E.D. Ark. 1979).

Next, in *Abraham Construction Co. v. Texas Industries, Inc.*, 604 F.2d 897, 900 (5th Cir.), *rehearing denied*, 608 F.2d 524 (5th Cir. 1979), *cert. petn. pending*, No. 79-1144, which, like *Professional Beauty Supply*, involved a third party complaint, the Fifth Circuit flatly rejected the Eighth Circuit's rule:

> Although we have carefully considered the arguments set forth in the [Eighth Circuit] majority's opinion, we are unable to agree that a right of contribution should be allowed among violators of the antitrust laws.

Thereafter, the Fifth Circuit simply followed its no contribution rule in this case and the *Westvaco* case in which a petition for certiorari is also pending (No. 79-972) and in which this Court has requested the views of the Solicitor General. Both of these cases involve cross-claims against settling defendants. The Fifth Circuit did not even mention the difference between the procedural context in *Abraham Construction Co.*, and in this case, but merely said: "That decision controls this case." (Pet. A-64.)

Finally, the Tenth Circuit chose to follow the Fifth Circuit's no contribution rule in still another procedural context—an independent suit for contribution following payment of a judgment by one joint tortfeasor. *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Tr. Cas. ¶ 62,995 (10th Cir. 1979), *rehearing en banc granted* (Dec. 27, 1979).

Thus, the Fifth and Eighth Circuits are in direct conflict and the Tenth Circuit has conditionally sided with the Fifth Circuit on the substantive law issue of the availability of antitrust contribution—and just about every imaginable procedural context is involved. If this is not a conflict among the Circuits, it is hard to imagine what is.

B. The Choice of Law Conflict.

Respondents also argue that the Fifth Circuit did not err in refusing to apply the contribution law of the Eighth Circuit, from which all of the actions involved in this case were transferred. They say that only the *state* law—and not the *federal* law—of the transferor forum need be applied by the transferee forum, citing *In re Pittsburgh & Lake Erie R. Co.*, 543 F.2d 1058, 1065 n.19 (3rd Cir. 1976). (Opp. Br. 18.) While we believe that proposition was *dictum* in that case, if it was the holding, as respondents claim, it squarely conflicts with holdings of the Second Circuit and the Judicial Panel on Multidistrict Litigation[10] and provides still another conflict for this Court to resolve.

It is obvious, as respondents argue, that if there is to be a consolidated trial of cases transferred from courts with diverse substantive law, that of one jurisdiction must be chosen.[11] Where the conflict is between the substantive law of different states, as in consolidated diversity cases like *Bott* (Opp. Br. 18), the trial court is compelled to choose one jurisdiction's law because no federal court can resolve a local law conflict between the states. But where, as here, the conflict is in the interpretation of federal law, this Court is expressly authorized to resolve the conflict and that is why certiorari should be granted here. The Fifth Circuit's unreasoned choice of its own law constitutes an overruling of Eighth

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[10] *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 408 n. 7 (2nd Cir. 1975); *In re Plumbing Fixtures Litigation*, 342 F.Supp. 756, 758 (JPML 1972).

[11] There are two easy alternatives to consolidation that would avoid the choice of law problem: Severance for trial under Federal Civil Rule 42(b) or remand to the transferor court pursuant to 28 U.S.C. 1407(a).

Circuit law *sub silentio* and, therefore, a usurpation of this Court's power.

Finally, the arguments (Opp. Br. 19) that the law of antitrust contribution is in its early stages of development and Congress is considering a bill to resolve the controversy (in favor of contribution, it might be noted) are irrelevant to the need for certiorari in this case. The point is that contribution is a current, vital issue affecting the entire course of antitrust litigation, and the conflict needs to be resolved as soon as possible on the basis of existing law, not speculative future legislation.

CONCLUSION

The Spencer settlement (and, later, the Flavorland settlement) was carefully designed to avoid the class certification procedure required by Rule 23(c)(1) and the kind of scrutiny of the compromise of class claims mandated by Rule 23(e). The mere threat of class certification became the vehicle for a settlement of class claims which was inherently both coercive and collusive: The settling defendants were forced to the bargaining table, despite the absence of any evidence of antitrust violations, but also took advantage of the situation to avoid litigation costs and possible exposure to billions in damages for relatively insignificant amounts designed solely to benefit the non-class and representative plaintiffs. The District Court, tied into the procedure from the outset by *ex parte* communications, required no proof of probable liability or damages, which go to the heart of the fairness and adequacy of the settlement, and no proof that the settlement class met Rule 23's stringent requirements of typicality and adequacy of representation, predominant common questions of fact or law, and manageability. Non-settling defendants were denied standing

to challenge the procedure, but then had the settlement class approval used against them in their continuing opposition to the certification of a litigation class. Absent class members were discouraged from appearing by a notice which virtually promised reimbursement of undisclosed expenses to non-class and representative plaintiffs, leaving nothing for the class. And the class member who dared to oppose the procedure was ignored because he objected to the misuse of class claims to generate a fund to be used for purposes contrary to the best interests of the class.

What happened here perfectly illustrates why the Manual correctly warned that neither Rule 23 nor the wise administration of class actions authorizes settlement prior to certification and why no court (until this case) approved a class settlement which did not completely dispose of the case.

Certiorari should be granted to nip the pernicious precertification settlement device in the bud and, at the same time, review and clarify the interplay of antitrust contribution and partial settlements.

ADDENDUM REPLY TO PLAINTIFFS' SUPPLEMENT

As this reply was being printed, petitioners received a "Supplement to Joint Brief in Opposition to Petition for Writ of Certiorari" filed by the plaintiffs but not joined by settling defendants Spencer and Flavorland. This astonishing document reveals plaintiffs' strategy to cause the greatest possible prejudice to IBP and MBPXL through the settlement class device and also plaintiffs' desperation to avoid the contribution issue through gross distortions of the record. Plaintiffs' supplement injects matters wholly extraneous to whether certiorari should be granted to decide the substantive issues raised by the petition, but its misrepresentations cannot go unanswered.

I.

DENIAL OF LEAVE TO CROSS-CLAIM FOR CONTRIBUTION WAS NOT A DISCRETIONARY RULING.

In the joint brief opposing certiorari, both plaintiffs and the settling defendants argued that this Court should not review the substantive antitrust contribution issue because the District Court's order denying leave to amend IBP's answer to assert a cross-claim for contribution against Spencer was not a final determination that contribution was not available and because the conflict in the Circuits is over the right of contribution against a third-party defendant, not a co-defendant. (Opp. Br. 16-19.) As demonstrated above, neither of these propositions is true as a *matter of law.*

Now, plaintiffs (but not Spencer and Flavorland) make the further argument that the District Court's

denial of leave to amend was based upon the discretionary grounds of unreasonable delay, lack of facts to support the contribution claim, and prejudice to the settling parties and a third party (Land O'Lakes). (Supp. Opp. Br. 2-5.) This proposition is also untrue—this time as a *matter of fact.*

District Judge Taylor's order denying IBP's motion to amend its answer to assert a cross-claim for contribution against Spencer under Rule 13(g) was expressly based

> [u]pon the memoranda of law, and upon this Court's determination that no right of contribution exists under the Federal antitrust laws, and upon all of the files, records and proceedings herein * * *.[12] [Pet. A-22.]

Nowhere in the record (let alone in the order itself) did Judge Taylor indicate that leave to amend was being denied because of delay, lack of facts, or prejudice, though plaintiffs had argued those points.

Nor would there have been any basis for a discretionary denial of leave to amend on those grounds. IBP moved for leave to amend shortly before the August 11, 1978 hearing because it had become apparent that the District Court intended to approve the settlement and Spencer would be dismissed. Unless IBP made its motion then, it would lose the right to cross-claim against a co-defendant and (if not barred by laches) would be relegated to a separate contribution suit at the end of the line. IBP cross-claimed against Spencer—and not against the other co-defendants—because it was

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[12] Plaintiffs' suggestion that the reference to "the files, records and proceedings herein" was intended to cover the procedural discretionary grounds now argued to support the order is ludicrous: Judge Taylor routinely makes that reference in all of his orders, after stating the specific grounds for his decisions. (See Pet. A-5, 23.)

about to be dismissed; the others were not. IBP had, indeed, earlier argued that a prayer for injunctive relief in the *Cameron* complaint against a variety of industry-wide practices should be dismissed for failure to join the other 1,665 packers without whom effective relief could not be granted. But that motion was denied and there was no reason—or compulsion—at this stage to try to implead other packers who were not named as co-conspirators in the treble damage complaints. IBP's cross-claim was in no sense untimely: The class action had not been filed until July, 1977, there had been no progress at all in any of the cases since that time, and the Spencer settlement was not even disclosed until May 25, 1978.

Nor was IBP's motion to amend filed in bad faith solely to keep Spencer in the case;[13] rather, a contribution cross-claim is the only rational way IBP could protect its rights if discovery and trial should prove that the cattle purchasing practices at issue, common to Spencer as well as IBP, violated the antitrust laws, but that

[13] Plaintiffs falsely suggest (Supp. Opp. Br. 4) that IBP's General Counsel (Heubaum) told Spencer's General Counsel (Eastwood) he would do everything possible to keep Spencer in the litigation. Heubaum testified that, when Eastwood called him to apologize for being forced into a settlement, Heubaum told Eastwood that if Spencer was going to settle, IBP would have to consider filing a cross-claim for contribution. Eastwood confirmed that Heubaum's testimony of what was said was correct "in sum and substance" except he apparently interpreted it as meaning that the purpose of the cross-claim was to keep Spencer in the litigation. (8/11/78 Tr. 61-62, 75.) In fact, IBP did not use the cross-claim as a device to keep Spencer in the litigation. IBP has urged consistently that contribution be applied, as it has in the Eighth Circuit (*supra*, p. 15 n.9), to permit a defendant to settle not only its liability to the plaintiffs, but also its contribution liability to co-defendants. This is accomplished by reducing any judgment to the extent of the settling defendants' share of the collective fault.

Spencer's settlement was less than its fair share of damages. Certainly IBP denied—and continues to deny—that it has done anything wrong; but if it has, Spencer is equally culpable and the proposed cross-claim was as specific as it could be without knowing the basis for plaintiffs' grapeshot allegations of antitrust liability.

Allowing the cross-claim to be pled would not have delayed this litigation, which is still in its infancy. Indeed, merit discovery had not even commenced.

There is no way that Land O'Lakes could have been prejudiced by allowing the cross-claim. Its original tender offer for Spencer's stock (at double the current market price) was contingent on Spencer being dismissed from the antitrust litigation (an additional element of coercion on Spencer), but Land O'Lakes expressly waived that condition and consummated the tender in October, 1978 even though Spencer's dismissal was being appealed. Land O'Lakes was in no sense a surprised third party "which purchased Spencers [sic] assets relying on the settlement", as plaintiffs assert. (Supp. Opp. Br. 4.) Nor does Spencer (now owned by Land O'Lakes) make any such claim, for it did not participate in the plaintiffs' supplemental brief.

In any event, settling parties cannot by their settlement extinguish whatever contribution rights a non-settling defendant may have, *Martello v. Hawley*, 300 F.2d 721, 724 (D.C. Cir. 1962); *Altman v. Liberty Equities Corp.*, 54 F.R.D. 620, 625 (S.D.N.Y. 1972), and IBP's contribution proposal of reducing plaintiffs' damage claims by the settling defendants' share of liability would deter only those cheap, collusive settlements which should not pass muster under Rule 23(e) anyway.

Therefore, not only did the District Court base its denial of leave to amend solely on the legal conclusion that no right of contribution was available; but there was no basis for a discretionary denial on any other ground. Finally, the Fifth Circuit, whose decision is at issue here, affirmed solely on the ground that contribution is unavailable as a matter of law.

II.

RECUSAL IS NEITHER ADEQUATE NOR TENABLE.

Plaintiffs now "disavow" the contention made in the joint opposition to certiorari (Opp. Br. 16) that the non-settling defendants' only remedy to the prejudice stemming from the settlement class determination was to seek the recusal of the District Judge. If the settling defendants actually believed recusal to be a realistic remedy, they missed the whole point of plaintiffs' strategy: having the District Judge who certified the settlement class find himself locked in to plaintiffs' class contentions when he turned to the litigation class question. Plaintiffs claim (Supp. Opp. Br. 5) that the District Judge has said that the settlement class will not affect his litigation class decision, but their record references simply do not support that statement[14] and plaintiffs have argued exactly the contrary to the District Court.

The settling parties' disagreement over whether Judge Taylor should recuse himself from deciding the litigation class certification motion perfectly illustrates the

[14] Plaintiffs' record citations are to the orders conditionally determining the Spencer and Flavorland settlement classes and settlements, prepared by the settling parties, which merely recite that counsel for the settling parties "agree to the formation of a Temporary Settlement Class solely for purposes of this proposed settlement." (Pet. App. 6-7, 25.)

non-settling parties' prejudicial dilemma. The obvious solution is neither recusal (a harsh remedy which would destroy the utility of multidistrict transfers to a single judge who can manage the entire course of complex litigation) nor giving plaintiffs the bootstrap of a preliminary, uncontested determination of class propriety. Rather, the only solution fair to all parties is to prohibit settlement classes, which, after all, only requires that settlement be deferred until the Court makes the expeditious determination whether the action may be maintained as a class action which is mandated by Rule 23(c)(1).

Respectfully submitted,

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